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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1951

No. 312

CHARLES L'HOMMEDIEU, JOHANNA W. LINDLOF, LUCILLE SPENCE, SAMUEL C. GREENFIELD, EMMA SCHWEPPE, *Appellants,*

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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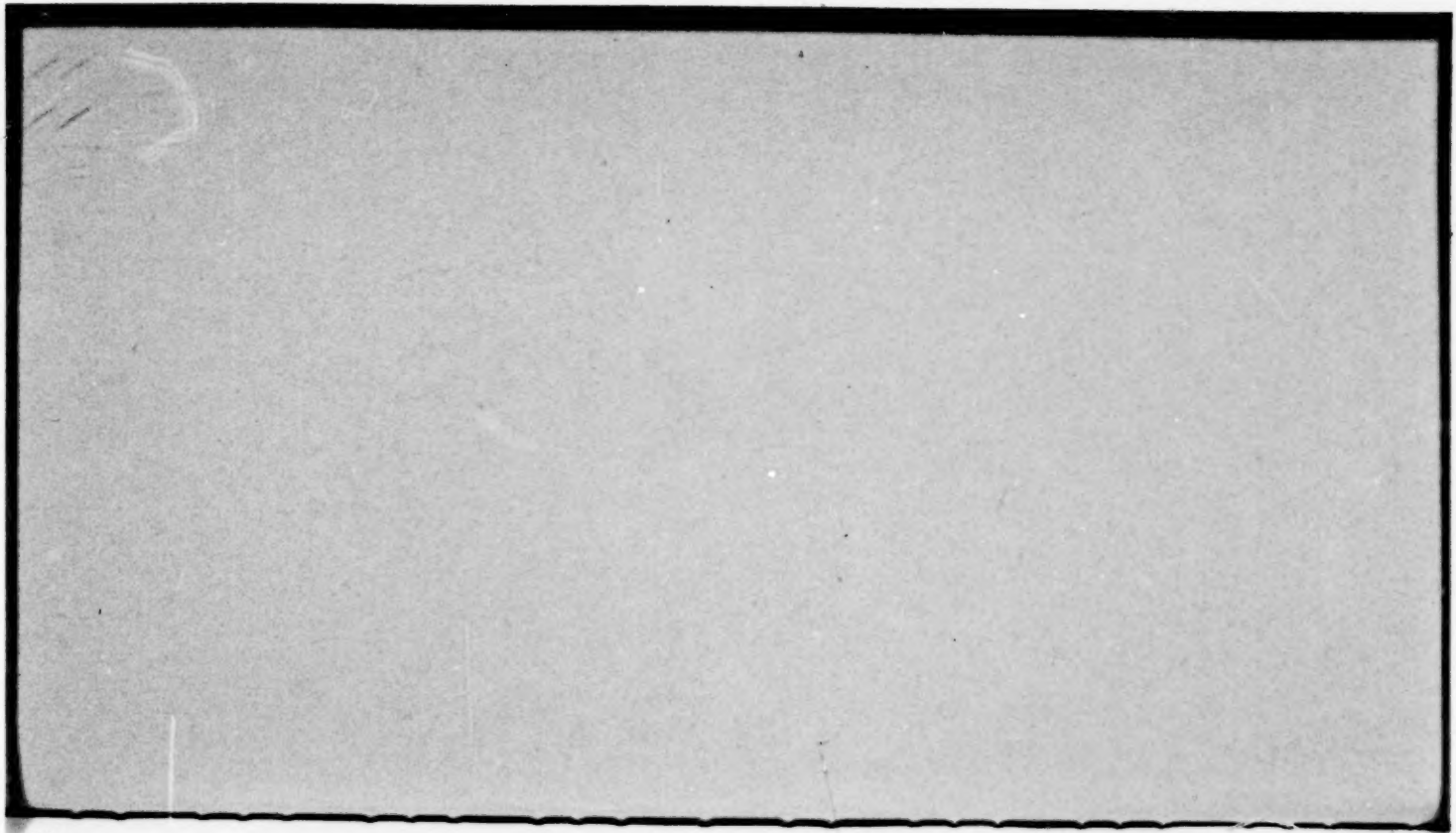

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 312

In the Matter of the Application of

CHARLES L'HOMMEDIEU, JOHANNA W. LINDLOF, LUCILLE SPENCE, SAMUEL C. GREENFIELD, EMMA SCHWEPPE, *Appellants*,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, CONSISTING OF WILLIAM J. WALLIN, JOHN P. MYERS, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, WELLES V. MOOT, CAROLINE WERNER GANNETT, DOMINICK F. MAURILLO, JOHN F. BROSMAN AND JACOB L. HOLTZMAN; THE UNIVERSITY OF THE STATE OF NEW YORK, AND FRANCIS T. SPAULDING, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *Appellees*.

FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE ACT.

STATEMENT AS TO JURISDICTION

Appellants having presented this day their petition for appeal now file this, their statement of the basis on which they contend that the Supreme Court of the United States

has jurisdiction to review the judgment in question and to exercise such jurisdiction in this case.

The Statutory Provisions Believed To Sustain the Jurisdiction

This appeal is prosecuted from a final order of the Court of Appeals of the State of New York which is the highest court of the State of New York in which a decision in the within matter can be had. The question presented is the constitutionality and validity of Chapter 360 of the Laws of 1949 of the State of New York, commonly referred to as the Feinberg Law, on the ground that on its face and as construed, it violates several sections of and amendments to the Constitution of the United States. The decision of the Court of Appeals was in favor of the constitutionality and validity of said statute. This Court has jurisdiction on appeal to review the final order in question by virtue of the express provision set forth in Title 28, United States Code, Section 1257.

The Statute Involved

Chapter 360 of the Laws of 1949, being Section 3022 of the Education Law, commonly referred to as the Feinberg Law, reads as follows:

> "Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, having infiltrated into public employment in the public schools of the State. This has occurred and continues despite the existence of statutes designated to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States

or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classrooms. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

"Section 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three

thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

"Section 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

"Section 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employes in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence

that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may appropriate, to ascertain the extent to which such provisions of the law have been enforced in the city and school districts of the state.

"Section 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

"3022. Elimination of subversive persons from the public school system.

"3023. Liability of a board of education, trustee or trustees.

"3024. Teachers responsible for record books.

"3025. Verification of school register.

"Section 5. This act shall take effect July first, nineteen hundred forty-nine."

Rules Were Promulgated by the Board of Regents of the State of New York for the Implementation of Said Statute and Purportedly Pursuant to Its Directives as Follows:

"RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

Chapter XV-B

Subversive Activities

"Section 254 *Disqualification or removal of superintendents, teachers and other employes.*

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

"a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

"b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) State that there is no evidence indicating that such

teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

"c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

"d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

"e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons servicing on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

"2. Pursuant to chapter 360 of the Laws of 1939,

the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

"3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that

action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

"4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

"5. This section shall take effect immediately."

Excerpt from Minutes of Hearing Held by the Board of Regents on the Feinberg Law, July 14, 1949, in the Education Building, Albany, N. Y.

(The meeting was called to order by the chairman of the Board of Regents at 1:10 P.M.)

Hon. Welles V. Moot, Chairman: We will proceed with the hearing called for one o'clock today. This hearing is called in connection with the inquiry which the Regents are conducting to determine whether there are organizations which are subversive within the definition of the so-called Feinberg Act. That definition is that any organization who advocates the overthrow of the United States Government by force is a subversive organization. I won't com-

plete the definition of that. The Attorney-General of the United States, after long investigation by Federal Authorities, has listed as subversive within that definition five organizations. They are: the Communist Party, the Socialist Workers Party, the Workers Party, the Industrial Workers of the World and the Nationalist Party in Puerto Rico.

In connection with the Regents' inquiry, the Statute calls upon us to call such hearings as we deem appropriate to help us in our investigation. This hearing is called for the purpose of giving these five organizations an opportunity to be heard orderly as well as file briefs. It is for no other purpose. This is not a hearing to discuss the pros and cons of the Feinberg Act. It is solely for these five parties whom the Attorney General of the United States has listed as subversive. No other parties will be heard.

Senator Morritt: May it please the Regent.

Chairman: Are you one of the parties?

Senator Morritt: May it please the Regent. I didn't know about that but I came all the way from New York not to diesuss the pros and cons of the Feinberg Bill but to indicate to the Board of Regents how they may, I say this very humbly——

Chairman: We cannot hear any other parties than the five parties mentioned. If I would permit you to talk I would have to permit others to talk also and there would be no limit to it. The five parties here today would not have a chance.

Senator Morritt: May I say that I shall limit my remarks to five minutes.

Chairman: No, I will give you no time.

Senator Morritt: It is in the American tradition that I be allowed to be heard.

Chairman: No, not at this hearing.

Senator Morritt: May I request a hearing?

Chairman: You may request one.

Senator Morritt: May I request it now, sir, because I came from New York?

Chairman: I make no promises.

Senator Morritt: I don't ask you to make a promise. I would appreciate inasmuch as the Board of Regents wants to hear the so-called organizations that are so-called "subversive" under the opinion of the Attorney known as the Attorney-General that the citizens, whether they be an organization or not, be allowed——

Chairman: I have your request.

Senator Morritt: Is that final?

Chairman: That is final.

Mrs. Rose Thaler: May I——

Chairman: I cannot permit any other parties to be heard at this hearing.

Mrs. Thaler: I would like to make the same request.

Chairman: No oral arguments or proceedings except by these parties.

Lee Pressman: I want to ask to make an inquiry of the committee sitting here today. I appreciate what you have said that the original purpose of this hearing was to make inquiry with respect to the nature of certain designated organizations but there are two questions that my organization, namely the Teachers Union, wishes to present.

Chairman: You may present them in writing.

Lee Pressman: First——

Chairman: I am not going to hear you.

Lee Pressman: I am not making a presentation. I am just making an inquiry, Mr. Chairman, and it seems to me that a few things that the Board of Regents may extend to people of the State and organizations that are interested is in the courtesy at least of making their inquiries to the Board of Regents.

Chairman: You can make your inquiries in writing or at some other time. This hearing is not for the purpose of you——

Lee Pressman: I understand you want to receive briefs.

Chairman: Very glad to receive briefs.

Lee Pressman: May I ask, will we at least be given some time to present briefs with respect to the presentation?

Chairman: If you give me just a moment, you will.

Lee Pressman: I am not talking about the organizations you enumerated.

Chairman: You can present any other organizations.

Lee Pressman: I am sorry to delay. I will take a very brief moment. I understood that the Board of Regents had announced that tomorrow will be issued or may be issued the regulations under the Feinberg Act.

Chairman: That may be but this hearing is not on the regulations.

Lee Pressman: We'd like to submit either a brief or we'd very much prefer, we think we are entitled to an opportunity of expressing our viewpoint on the basic issues, the Feinberg Law and the regulations before they are actually issued because bear in mind, Mr. Chairman, neither the Legislature nor the Government, and now we are being threatened, and not even the Board of Regents will give us this opportunity to be heard on an act which vitally effects all the citizens of the State.

Chairman: Sit down, please. I have heard your request and we will reconsider what we wish to do. I will make you no promises about when the regulations will be issued or whether you will have a hearing first.

Lee Pressman: I am asking this. I am submitting now a specific request that at least my organization, the Teachers Union, and other organizations in the State of New York, representing the people of New York, be given an

opportunity by the Board of Regents to express themselves on the basic issues of the Feinberg Law.

Chairman: I have your request.

Lee Pressman: It is impractical on this whole situation so that before any steps are taken by the Board of Regents that an opportunity be at least given.

Chairman: I have your request.

Arthur Schutzer, American Labor Party: May I point out for the record something that may guide you in your deliberations today, that at no time during the course of the passage of the Feinberg Law either in the Senate or the Assembly was a public hearing granted despite a widespread request——

Chairman: I am sorry I cannot hear——

Arthur Schutzer: I promise I will confine myself to one minute.

Chairman: I can't give you one minute. I am not hearing anybody except the parties in this proceeding today. Will you please sit down?

Arthur Schutzer: May I, in behalf of the American Labor Party, formally join with the request that a hearing be given to the public before any action is taken by this Board in any respect regarding the Feinberg Law. On behalf of the American Labor Party, we are under very sharp protest about the procedure and denial to representatives who have come from all over the State to be heard especially in view of the fact that there never has been a hearing.

Chairman: Your organizations all sent telegrams and all were notified about the purpose and nobody else will be heard.

Arthur Schutzer: We are protesting about the proceedings here.

Mrs. Ada B. Jackson: I just want my name added to that list asking for an opportunity to be heard. Ada Jack-

son of the Brooklyn Interracial Assembly and as Chairman of the Schools Council of Bedford-Stuyvesant in Williamsburgh in Brooklyn.

Mrs. Rose Thaler: Also Rose Thaler of the National Congress of American Women.

Dorothy Allen: Dorothy Allen, United Public Workers, New York District.

Edith Lutzker: I am a parent of children in the public school system and I am deeply concerned. I feel that the parents of children in public schools have a real interest and concern in this and they should be given an opportunity to get their opinions heard.

Chairman: You cannot be heard.

Dave Green: I also want my protest voiced in behalf of the membership of the International Workers Order.

Mrs. Stella Shepherd: I also would like my name added to that, Mrs. Stella Shepherd, also a parent and a very active and energetic worker in the Parents Association in the City of New York but I would also like my request added to that. I think definitely parents should be heard.

Senator Morritt: You have a perfect right to do as you see fit. I had no notice at all otherwise I would not have come up here to waste my time. I had no notice at all. I had assumed that you would give us the same right as we in the Legislature would give you although there was no hearing on the Bill. May I make this request at your direction? Inasmuch as I am a Senator of the State of New York, might I be the only one to speak five minutes and make a compromise, shall I say?

Chairman: No, you might not.

Senator Morritt: May I remind the chairman today is July 14, the Fourth of July in France. It's a rocky road to freedom, and all we ask for is the right—just give me five minutes.

Chairman: I will not give you five minutes nor any time.

Senator Morritt: I think the others will waive.

Chairman: That won't make any difference. We are holding this hearing solely for the purpose stated. That is final.

Senator Morritt: All right, I must abide. I don't think I am going to submit my brief at this time and I am going to gamble—not on any promise that you made—in the hope that the Regents will set aside a day and that the Regents will do that which the Legislature failed to do—and that is—have a public hearing. Grant us this public hearing, let us get it off our chests and then you can still promulgate whatever rules——

Chairman: Senator, you say to give you the right. You want a right which the Legislature denied. Would you as a Senator grant us the right to repeal the Feinberg Act that was passed by your body and the Assembly and signed by the Governor?

Senator Morritt: Since you are not hearing me, may I answer the Regent? I am coming here to say that you should not reject the Feinberg Bill but under the Feinberg Bill you can reject the passing of the buck by the Legislature because the Feinberg Bill is merely a speech by Senator Feinberg and in this bill the Legislature is passing you a hot potato and there is nothing in this bill which forces you to do anything but ask an organization, "Do you advocate the overthrow of the United States Government by force and violence"; and if those people say, "no", the presumption is that a man is sane, not insane; honest and not dishonest; patriotic and not unpatriotic; and innocent until proven guilty. The Legislature having failed to define what is subversive, the Legislature having failed to give you one single penny in appropriation, the Legisla-

ture having failed to tell us what to do, we have the right to assume that these people in this room are presumed to be innocent until proven guilty. Might I say that I represent two people, myself and the Lawyers Guild, the National Lawyers Guild, of which I am a member and I do hope that the Attorney-General of the United States doesn't put me some day in the category that I might be deemed "subversive" because I belong to an organization of thousands of lawyers and I only know a handful—with whom I might play gin rummy with, no galloping around with—and some day an Attorney-General in Washington might not like me and say I belong to a "subversive" organization. Thank you for listening.

Chairman: We have listed here, American Labor Party, Dollinger or Schutzer; Brooklyn Congress of American Women, Mary Jane Melish; National Lawyers Guild, Silverman; Federation of Social Action of New York City, Jack R. MacMichael; Young Progressives of New York, W. Lindheim; Teachers Union, Abe Liederman of New York, who wish to appear "amicus curiae" and file briefs. You will have two weeks in which to file your briefs. If there are any other people who wish to appear, you will file briefs. If you will give them to the secretary, you will have the same two weeks in which to file your briefs and any arguments you wish to make.

Now we will proceed with the hearing. The parties listed here are the Communist Party, represented by Lillian Gates and Abe Unger; Industrial Workers of the World, Rowld Watts; Socialist Party, Workers Party by Farrell Dobbs and the Independent Socialist League taking place of the Workers Party dissolved by Hal Draper, acting chairman. That is four groups to be heard. We have not quite four hours. We might extend if necessary fifteen minutes. Would it be satisfactory to the persons named if we give each one hour?

Mrs. Lillian Gates: It definitely will not be. You heard from the opening remarks that we were asking very serious questions. My organization, the Communist Party, we will not be able to present any kind of adequate answer to that within an hour's time. We definitely need at least two hours and perhaps more depending on the amount of arguments we might present orally and in testimony.

Chairman: How about the Industrial Workers of the World?

Industrial Workers of the World: For the Industrial Workers of the World, if our simple affirmation that we are not concerned with the overthrow of government is all that is required, one minute. But if we have to contend with ten million shadowy vague suspicions, I might say right here it is not enough.

Socialist Workers Party: Like the man who last spoke, in a word I can give you our answer. I can make the statement I propose to make in something less than an hour.

Chairman: About how long do you think you could, recognizing there are four hours to be divided?

Farrell Dobbs: It takes me about thirty minutes to say what I have got on my chest.

Chairman: As far as the Industrial Workers of the World, how much time should we give you out of the four hours?

Industrial Workers of the World: I doubt if more than half an hour.

Chairman: Workers Party Independent Socialist League?

Workers Party: It will take about an hour.

Chairman: Would it be fair to give you 45 minutes? One hour and 45 minutes; that will leave for the Communist Party at least two hours, perhaps more.

Mr. Gates: I'd like to add to that answer that in this two hours we do not feel under the conditions which have

been established in this hearing that it is possible to fight for democracy which is involved in this Feinberg Law adequately and to develop this argument. We don't think that two hours is adequate nor do we think that the conditions under which this hearing have been established are such as to provide due process. For example, we think that the Feinberg Law is one definite interest and affects vitally not only the interests of all these organizations here who could not speak but of every single New Yorker.

Chairman: I understand that is part of your argument.

Mrs. Gates: I am saying that this two hours is only a minimum in which to establish certain safeguards for democratic rights of New Yorkers. We are going to ask at the end of that time for two things: one, the stopping of any attempt to enforce the unconstitutional Feinberg Law and secondly, the establishment of real guarantees for due process, not a matter of two hours or half an hour, etc. I would also like to say I do not understand the ruling that this hearing is to consume only four hours. I think that is unprecedented. If you call organizations here to present their positions, if you say it is a hearing, then it is up to those organizations to say how much time will require and not for the Board of Regents to issue an arbitrary predetermined amount of time to be consumed. That is not a hearing. It is a rigged predetermined hearing which indicates that the decisions had already been reached.

Chairman: Each of you will have any affidavits you wish to file and any briefs you wish to file and any other documents. This hearing is an oral hearing and it is quite customary in the courts and everywhere else to limit the time for the oral argument. That does not limit the time for the written argument and does not limit the opportunity for filing affidavits. We will give the Communist Party two hours, the other two parties to take thirty minutes,

thirty minutes and forty-five minutes. Who will speak first for the Communist Party?

Note: At this point Mrs. Lillian Gates of the Communist Party addressed the Board of Regents in response to the Chairman's question.

After Mrs. Gates had concluded her statement, Mr Rowald Watts of the Industrial Workers of the World, Mr. Farrell Dobbs of the Socialist Workers Party and Mr. Hal Draper of the Independent Socialist League also addressed the Board of Regents. These speeches lasted from approximately 1:15 P.M. until about 5:00 P.M. Senator Moritt, the attorney for the Appellees was unable to obtain a transcript of any of the foregoing statements, except that of Mr. Farrell Dobbs of the Socialist Workers Party.

In the mean time, while these speeches were being made, Senator Moritt was endeavoring to prevail upon the Board of Regents to allow others the right to speak who had previously been denied such right by the Board and at about 5:00 P.M. was partly successful. Senator Moritt was permitted to speak therefore at approximately 5:00 P.M. on the day of the hearing and his statement follows:

Senator Moritt: I doubt whether I will get any applause when I am finished. Regent (Addressed each one): I want to express my appreciation for your courtesy here. This is not on my time because I am just saying thank you, please. I want to say one thing here which is very important. These people come up here from all parts of the state. They are not lawyers and I know you have been very patient. They are condemning the Feinberg Bill, which has no place here. You had no part in that. The Legislature, having spoken wisely or unwisely, it is the law of the land, the law of the State of New York. And your duty—you can feel the way I do, because this bill was introduced on March 11th, nineteen days before session

was over. It was reported in the Senate March 22, 8 days before the Legislature adjourned; amended after it was reported on March 22, amended and passed the Senate on March 29, passed the Assembly on March 30, went to the Governor's office on the 31st and he signed it on April Fool's Day, April first. No hearings. What these people are saying to you is they are getting it off their chests because that is what they should have had the right to say before the Legislature and you are not to blame at all. I hope the people understand it. You have a job to do and you must administer the law.

I say to you right now, I want you to enforce the Feinberg Bill. That is my point. Since when are you going to enforce a speech? That is what you have here. I agree with everything that Feinberg says in this bill, every word he says, but he isn't half as good a speechmaker as that gentleman from the IWW. Is it going to be the speech of Fred Thompson or Feinberg? Are you going to substitute the name Feinberg for Jefferson and Lincoln? So I say, enforce the Feinberg Bill. I defy you to. I have the bill in front of me. He makes many speeches and says you, the Board of Regents, shall adopt, promulgate and enforce rules and regulations for the disqualifications or removal of superintendents and that is what you should do and all I ask you to do is to follow the Constitution, follow the law. You have three distinguished lawyers of the four Regents. All I say to you is now you can take the Legislature and say we give the Regents examination to the children—it is about time we gave the Regents examination to the politicians who call themselves legislators.

That is what you are going to do because I apoligize for the people in this room. It reminds me of the story of a wife and husband who come home after the marriage and say thanks for doing nothing. Imagine what will happen

if you do something! You promulgate rules and regulations and all you have to do is say to the lawyers of the Legislature, who passed the law examination, and to all the others who took examinations, undertakers or insurance men in the Legislature, did you ever hear of the presumption of innocence that a man is patriotic, not unpatriotic, a man is legitimate and not illegitimate? That is what we are going to promulgate!

We will get up a list and we will have rules and regulations, the ones set down by the United States Supreme Court, Court of Appeals, the State of New York and by the Constitution as you lawyers know it. That is what you are going to do on the Feinberg Bill and nobody has to worry. The Legislature gave you in line 25 Board of Regents, charged primarily with the responsibility of supervising public school systems in the state, should be admonished — admonished for what? Senator Feinberg promoted to $17,000 a year with $5,000 lulu—a $5,000 lulu to enforce the law! You haven't got a dime. They give you high-sounding speeches. How are you going to enforce this thing?

May I say this, gentlemen of the Regents, for whom I have the highest respect, you've done a great job, you are autonomous, nobody can tell you what to do, you have thirteen years: nobody can touch you, you understand; you are the boss of this bill. You tell the Legislature the law says every ten years apportionment—we don't have it in over 26 years. The Constitution says, nor shall there be unreasonable searches and seizures, cargoes assailed—well, even though the Constitution says that no searches and seizures, you are without warrant; take evidence. By interpretation of the law, the law is prostituted. By God! You are going to take the law and say to the Legislature, we are going to follow the law; we are going to say we

will be glad to make up a list; give us the money. Give us the patronage. You will never get the money. The minute they have to give you money for you to get investigated you will never get it.

I say to you, promulgate laws so that the nation can look at the Empire State and the Board of Regents and say, that is a Department of Education. Don't I know that you were preparing a memorandum in opposition to the Dewey Bill when suddenly they said as in the operating room, doctor, stop operating, the patient is dead. You were preparing a memorandum in opposition to this bill and Governor Dewey already signed it. These people are mistaken. You are on their side. You are opposed to this bill. They shouldn't be insulting you. They should say, enforce the bill. More speeches—fine! I am going to conclude. Let me read to you what a President of the United States said and by God! teachers can't say it but a President can.

John Adams, in a letter to one John Tyler, said, "Remember, democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democrat that did not commit suicide!" That is a President of the United States! Will Rogers said, "Everybody is ignorant but on different subjects." Feinberg was ignorant of the Constitution! (Applause)

Let me read what Senator O'Mahoney, Republican leader of the Assembly from the Office of the State by the Republican Majority for release in the papers of Monday, March 14, three days after Feinberg introduced the bill. Listen to this. "This bill has been prepared in the best American tradition through a series of hearings and conferences in which leaders of management, labor, insurance corporations and business organization met with the representatives of the Legislature, * * *" bla, bla, bla. He didn't talk about the Feinberg Bill. How pretty it sounded when the

Republicans had the bill they wanted to pass! I am not being political here because I am not a Communist. I never was a Communist. I never will be a Communist. I loath Communism. I detest it with everything in me but by God! I will fight like hell for Mrs. Gates to get up here and if she wants to be a Communist and if she likes pickled eels she can be as wrong as she wants. I am not afraid of Communism! I am afraid of a failure of democracy!

I will conclude in the language of Thomas E. Dewey and he had to talk this way when he got the nomination. Had he talked this way in his campaign he would have been the President of the United States. This is how he spoke as a liberal when debating Stassen and I conclude my remarks. Thomas E. Dewey, Oregon, May 17, 1948, in his campaign for Republication nomination for the Presidency of the United States: "I am unalterably, wholeheartedly and unswervingly against any scheme to write laws outlawing people because of religious, political, social or economic ideas. I am against it because it is a violation of the Constitution of the United States and the Bill of Rights and clearly so. I am against it because it is immoral and nothing but totalitarianism itself. I am against it because I know from a great many years of experience that that propaganda wouldn't work and would rapidly advance the cause of Communism in the United States and all over the world. As I have watched this propaganda, this is a panacea of getting rid of ideas by passing laws, increasingly shocked. To outlaw the Communist Party would be recognized every place on earth as a surrender of the great method of totalitarianism. This is nothing but the method of Hitler and Stalin. It is the thought control following the Japanese war leadership. It is an attempt to beat down ideas with a club, to surrender everything you believe. Remember for all time to come in these United States,

prosecute men for crimes they commit but never for ideas they had!" Thomas E. Dewey.

I say to you in conclusion, gentlemen of the Regents, enforce the Feinberg Bill. I learned this in school and I passed by Regents: A thousand times nothing is still nothing. Make the law here! They say you can name the organizations and you have a right to say, we had a hearing according to law. We heard the five people who are on trial here and if one, if you remove one of them from the list as I think and I hope you will, then they must all be removed from the list because they have all denied the overthrow of the government of the United States by force and violence. Don't take the place of the Geheimnisstaatspolizei! You are not going to have your own police. If the Legislature wants to give you the money—and I hope they do—I am sure you can teach the Legislature a fine lesson and don't get me wrong. I like the Senate!

The Following Is the Statement Made by Mr. Farrell Dobbs, National Chairman, Socialist Workers Party, to the Regents Special Committee.

Mr. Chairman and Members of the Committee:

I appear before you today in response to Commissioner of Education Francis T. Spaulding's letter of July 1, to the Socialist Workers Party in which he stated:

"The Regents are conducting an inquiry to determine what organizations are subversive within the terms of Chapter 360 of the Laws of 1949 of the State of New York, commonly referred to as the Feinberg Act.

"You are so characterized by the Attorney General of the United States."

Not another word is said about any charges against us. The rest of the Commissioner's terse letter describes the narrow, arbitrary limitations on testimony at this so-called hearing.

In effect, Commissioner Spaulding has said to us: "The Regents intend to brand you subversive because the Attorney General has so branded you. The trial is already over. But if you insist, you may say a few words before sentence is passed barring your members from their constitutional right to employment in the New York public school system."

If that is to be your procedure, you are about to commit a grave injustice. You are about to add more innocent victims to the witchhunt that is spreading like a terrible plague throughout the country. You are about to move dangerously close to the actual burning of books, after the fashion of Hitler.

What evidence has Attorney General Tom Clark supplied you to back up his charge that the Socialist Workers Party is "subversive?" Before what legally-constituted tribunal has he proved this outrageous accusation? Were we informed of the nature of his charges against us? Did we have an open trial before a jury of our peers? Were we granted the right to confront our accusers and cross-examine them?

You do not, and you could not, have a shred of evidence that the Attorney General granted us a single one of these constitutional rights. For the facts are that Mr. Clark put us on his political blacklist without giving any explanation whatever for his high-handed procedure, and he has denied our repeated demands for a public hearing under due process of law to defend ourselves against his dictatorial action.

We didn't even know that the Socialist Workers Party had been put on the Department of Justice "subversive" list until we read about it in the newspapers. On July 28, 1948, I wrote a letter to Attorney General Clark in which I protested against his illegal action, requested a detailed

statement of all charges against us, and asked for a public hearing with the right to cross-examine our accusers and present witnesses in our defense.

Assistant Attorney General Alex Campbell replied as follows on August 16, 1948: "In the absence of provision therefor in the Executive Order (9835) the Department does not contemplate holding hearings in such matters, with or without specifications or charges."

I next sent a letter on August 26, 1948, to President Truman demanding that he direct the Attorney General to withdraw his illegal "subversive" list and grant us a public hearing under due process of law before taking any action against us.

My letter was ignored, so I again wrote to Mr. Truman on September 29, 1948, repeating these demands. Finally, on October 18, 1948, Assistant Attorney General Peyton Ford replied to my second letter to the President which he said had been referred to him.

Mr. Ford insolently told us that "the Attorney General has had strict regard for all of the substantial and procedural rights of those affected" by the "subversive" list.

While we were getting this runaround from the President, James Kutcher, a legless veteran, was fired from his clerical job in the Veterans Administration solely because of his membership in the Socialist Workers Party.

With the understandable indignation over this insulting, tyrannical treatment at the hands of the federal government, I immediately requested a personal interview with President Truman to protest this outrage. My request was ignored.

Such are the facts concerning the Attorney General's illegal branding of the Socialist Workers Party as "subversive". For a political party in power to thus suppress the constitutional rights of an opponent party is a long step toward a police state and undisguised thought control.

Date of Final Order Sought to Be Reversed and the Date upon Which the Application for Appeal Was Presented.

The final order of the Court of Appeals which is here sought to be reversed was rendered on November 30, 1950. This application for appeal is presented February 28, 1951.

Statement Showing That the Nature of the Case and the Rulings of the Court Are Such as to Bring the Case within the Jurisdictional Provision Relied upon.

The issues in this case were presented to the State court by objections to the petition in Point of Law (p. 52) * made by the appellees. Two other actions were brought in the State court presenting substantially the same questions, all of which were heard and decided together by the Court of Appeals. Appeals have been presented to this court in those actions which are entitled "Thompson v. Wallin" and "Adler v. Board of Education of the City of New York".

The instant proceeding is one brought pursuant to Article 78 of the Civil Practice Act of the State of New York for an order directing the appellees to cease and desist from taking any steps toward the enforcement of the provisions of Chapter 360 of the Laws of 1949 and to cease and desist from issuing any rules or regulations, orders or directives pursuant to said act and to treat said act as a nullity and in connection therewith the petition brought up for review the actions of the Board of Regents in promulgating rules purportedly in compliance with the directives contained in Chapter 360 of the Laws of 1949.

The petition in the case at bar was presented by five petitioners, and specifically alleges that they are all non-

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* The references are to the pages of the record printed for use in the Court of Appeals of the State of New York.

communists, are citizens, taxpayers, and members of the pension system of the City of New York. The petitioners are employees of the public school system with the exception of Johanna Lindlof who is a former employee (p. 4 et seq). These and subsequent facts were alleged specifically in order to protect the reputations of the petitioners in these times of hysteria.

The petition further alleges with respect to each of the petitioners their religious and political affiliations to indicate the diverse character of the petitioners who sincerely believe that the statute is unconstitutional.

Charles L'Hommedieu is a Protestant (Episcopalian) and an enrolled Republican and has been a teacher since 1913.

Johanna Lindlof is a Lutheran, an enrolled Republican and was employed by the Board of Education of the City of New York from 1890 to 1901 and from 1911 until 1936 when she was retired on pension and was appointed a member of the Board of Education of the City of New York and served as such until May, 1943.

Lucille Spence is a Protestant (Methodist) and enrolled in the American Labor Party. She has been an employee of the Board of Education since 1923.

Samuel C. Greenfield is of the Jewish Faith, enrolled in the American Labor Party and has been an employee of the Board of Education since 1927.

Emma Schweppe is of the Protestant (Episcopalian) is an enrolled member of the American Labor Party and since 1933 has been employed in the Board of Higher Education of the City of New York and prior to that time.

The proceedings were commenced on the 29th day of September, 1949 by the presentation of a petition to the Supreme Court of the State of New York. The order to show cause accompanying the said petition was signed by Hon. Isadore Bookstein, one of the Justices of the Supreme

Court of the State of New York which order to show cause contained a stay staying the appellees from enforcing any of the provisions of Chapter 360 of the Laws of 1949. The hearings of the Board of Regents had already been completed when the order to show cause was obtained and rules had already been issued purportedly pursuant to the statute. The procedure intended to be followed by the Board of Regents had become obvious at the time these proceedings were commenced because of the manner in which the hearing was held by it on July 14, 1949.

The petition attacked the constitutionality of the statute on various constitutional grounds (p. 16-20) among which were that it denied due process of law, it was a bill of attainder and an *ex post facto* law, it denied freedom of speech and assembly, and unlawfully provided for a presumption of guilt and guilt by association and was an unlawful delegation of powers to an administrative body, the Board of Regents.

At Special Term Mr. Justice Schirick sustained the contentions advanced by the petitioners that the statute was unconstitutional. (p. 115-149). A copy of his opinion is hereto annexed. Mr. Justice Schirick, among other reasons, held that the statute denied due process of law in that it unlawfully provided for a presumption of guilt, for guilt by association, was vague and indefinite and was a bill of attainder.

In the Appellate Division this determination was reversed (p. 159). A copy of the opinion of that court is also hereto annexed. The various constitutional objections to the statute were discussed and held inapplicable.

The Court of Appeals of the State of New York affirmed the order of the Appellate Division. In its opinion, a copy of which is hereto annexed, the Court of Appeals discussed and rejected the contentions of the petitioners that the statute was unconstitutional.

The Court of Appeals has so construed the statute as to permit the Board of Regents, an administrative body, to promulgate lists of allegedly subversive organizations and for that purpose to utilize lists promulgated by a federal agency, that upon such listing all employees of the public school system, both teachers and non-teachers, shall be *prima facie* disqualified from holding any position in the public school system, thus unconstitutionally creating a presumption of guilt and compelling such employee to prove his innocence, which procedure is contrary to the American standards of jurisprudence.

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial and the Authorities Relevant Thereto.

1. The statute vests judicial power over civil rights in an administrative body contrary to the constitutional guarantees of due process and of equal protection of the laws and in addition fails to provide for a proper judicial review of the actions of such administrative body.

Palko v. *Connecticut*, 302 U. S. 319;
Whitney v. *California*, 274 U. S. 357;
Staten Island Edison Corp. v. *Maltbie*, 296 N. Y. 374;
Frost Trucking Co. v. *Railroad Commission*, 271 U. S. 583;
Kovacs v. *Cooper*, 336 U. S. 77;
Board of Education v. *Barnette*, 319 U. S. 624;
Panama Refining Co. v. *Ryan*, 293 U. S. 388;
Cramer v. *U. S.*, 325 U. S. 1;
Tompkins v. *Board of Regents*, 299 N. Y. 469;
Friedel v. *Board of Regents*, 296 N. Y. 347.

2. The statute and the rules of the Board of Regents issued thereunder violate the 14th Amendment to the Constitution of the United States in that they deny adjective due process to employees of the public school system of

the State of New York by providing for an unreasonable presumption of guilt and guilt by association; and further, said statute violates Article I Section 10 of the Constitution of the United States in that it is a bill of attainder and an *ex post facto* law.

Schneiderman v. *United States*, 320 U. S. 118;
Winters v. *United States*, 333 U. S. 507;
Manley v. *Georgia*, 279 U. S. 1;
McFarland v. *American Sugar Co.*, 241 U. S. 79;
United States v. *Cohen Grocery Co.*, 225 U. S. 81;
Kotteackos v. *United States*, 328 U. S. 772;
Meyer v. *Nebraska*, 262 U. S. 390;
Mobile, J. & K. C. R. R. Co. v. *Turnipseed*, 219 U. S. 35;
Cummings v. *Missouri*, 4 Wall 277;
Kring v. *Missouri*, 107 U. S. 221;
United States v. *Lovett*, 328 U. S. 303;
Calder v. *Bull*, 3 Wall 386.

Point I

The Statute Vests Judicial Power over Civil Rights in an Administrative Body Contrary to the Constitutional Guarantees of Due Process and of Equal Protection of the Laws.

By Section 3022 paragraph 2 of the Statute (chapter 360 of the Laws of 1949) the Board of Regents is directed to give evidential force to listings by it of subversive organizations in regard to teachers and others in the school system. Manifestly, the listing is necessarily *ex parte* in relation to the teachers (Douglas E. Dayton, The "Little Red School House" and the Communist, 35 Cornell Quarterly, 824 at 839). An opposing construction of these statutory provisions would exclude from their coverage the members whose identity had not been ascertained prior to the promulgation of the list.

A statutory inference, if not a presumption, has consequently been established. This inference or presumption is provided for through an administrative determination of facts by a body concededly expert in its appropriate province of education and conversely and admittedly nonexpert within the domain of civil rights. It is at this point that "supremacy of law" is sacrificed (cf. James M. Landis, The Administrative Process, 152).

In the pursuance of both freedom of assembly and of his profession, the teacher is entitled to the highest degree of protection afforded by due process of law.

In *Whitney* v. *California*, 274 U. S. 357, Mr. Justice Brandeis in his concurring opinion, in which Mr. Justice Holmes joined, declared (373):

> "The right of free speech, the right to teach and the rights of assembly are, of course, fundamental rights. See *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Gitlow* v. *New York*, 268 U. S. 652, 666; *Farrington* v. *Tokushige*, 273 U. S. 284."

As to these and other fundamental rights defined as freedom of thought and speech, it was asserted (*Palko* v. *Connecticut*, 302 U. S. 319, 327):

> "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott* v. *McNeal*, 154 U. S. 34; *Blackmer* v. *United States*, 284 U. S. 421. The hearing, moreover must be a real one, not a sham or a pretense. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103."

That these conclusions are clear is amply supported by *Staten Island Edison Corp.* v. *Maltbie*, 296 N. Y. 374. In that case, it was held (381, 382):

> Faced with this limitation upon the jurisdiction and power of the Appellate Division in certiorari proceedings, to review a determination of the commission, and seeking an independent consideration by a court of the facts upon which its claim of constitutional right is predicated, plaintiff has brought this plenary action in equity to enjoin confiscation of its property used and useful in the public service, claiming that as a matter of constitutional right it is entitled to a fair opportunity of submitting the issue of confiscation to a judicial tribunal for determination upon its own independent judgment as to both law and facts (*Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287).
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> "The *Ben Avon* case (supra) has never been overruled; on the contrary the principle that where constitutional rights of liberty or property are involved due process requires independent judicial determination of the constitutional question in the courts, has been reaffirmed. (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51-52; *Crowell* v. *Benson*, 285 U. S. 22, 46, 60; *Baltimore & O. R. R. Co.* v. *United States*, 298 U. S. 349, 368-369; *State Comm.* v. *Wichita Gas Co.*, 290 U. S. 561, 569)."

Moreover, the findings of fact attacked successfully by the plaintiff in *Staten Island Edison Corp.* v. *Maltbie*, *ibid.*, as supplying the basis for rate orders, alleged to be denials of due process as confiscatory, were made by an administrative body of experts. The dissenting opinion for a minority of three asserted in part (388):

> "' * * * Indeed, we are asked to sustain the district court's decree as though it derived from an ordinary litigation that had its origin in that court, and as

though Texas had not an expert Commission which already had canvassed and determined the very issues on which the court formed its judgment. For it appears that the court below nullified the Commission's action without even having the record of the Commission before it. When we consider the limiting condition of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses.' (311 U. S. 570, 575-576). The statement just quoted is fundamentally at variance with the holding now being made by this Court in the present case: that the Federal Constitution requires that whenever a utility corporation alleges that a rate is confiscatory, the corporation is entitled to bring an equity suit and demand new, independent findings by the court as to whether or not the rate is reasonable and fair."

Under the Feinberg Act the right of an organization to review its listing by the Board of Regents as subversive under Article 78 of the Civil Practice Act of the State of New York is either non-existent, or if permissible the judicial hearing that would ensue would be a sham or a pretense.

The unconstitutional nature of the hearings intended to be conducted by the Board of Regents is best illustrated by what actually took place at the hearing of July 14, 1949 (ff. 257 to 308). That hearing was not consonant with American jurisprudence and in fact the Board prejudged the organizations guilt for the purpose of the meeting and adopted the listing of the federal agencies. The record shows that the Board denied anyone the right to oppose the listing except by the making of speeches and submission of

briefs. No one was permitted to exercise the right of confrontation of witnesses under oath, nor employ the right of cross-examination nor call his own witnesses or to produce documentary or other evidence to prove his innocence.

There is no doubt whether any rights of an organization as such as distinguished from those of its members would be affected or finally determined by its listing as subversive within the meaning of Article 78; thus, denying to it any remedy, with a resultant gap in due process and equal protection of the laws.

If such review is permissible the finding and listing of an organization as subversive would receive only the limited review accorded to an administrative determination. Such review is limited to errors of law alone; the courts determining not whether the record would "convince" one of the facts found by the administrative agency but only whether a reasonable man might so find *Tompkins* v. *Board of Regents*, 299 N. Y. 469; *Friedel* v. *Board of Regents*, 296 N. Y. 347).

The review provided the individual teachers by either Article 78 or Section 12a subd. d of the Civil Service Law is likewise illusory. The listing as subversive of the organization to which the teacher belongs is *ex parte* as to him as there is no statutory provision to guarantee the opportunity for adequate notice to or opportunity for cross examination on the part of the teacher during the preliminary investigations which determine that the organization he belongs to shall be listed as subversive. These guarantees are exacted by due process (*Williams* v. *New York*, 337 U. S. 241, 245) as conditions precedent whenever substantive rights are immediately affected by adjudication, as they unquestionably are by the inference or presumption provided for in the Feinberg Act. That Article 78 affords

only a limited review to the teacher as well as the organization has heretofore been shown (*Tompkins* v. *Board of Regents, supra*).

The right of rebuttal accorded the teacher under Section 12a Subd. d of the Civil Service Law is likewise illusory since in reality the words "prima facie" as used in the Feinberg Act in conjunction with Section 12a Subd. C of the Civil Service Law results in any practical sense in their being synonymous with "conclusive" and "irrebutable."

If mere proof of membership is sufficient to disqualify (Section 12-a, subdivision c), what evidence offered by an employee will overcome the *prima facie* evidence of disqualification? The Act is silent.

The Feinberg Act and the rules of the Board of Regents cast the burden upon the employee to prove his innocence. Must he prove that the listed organization is not subversive—an impossible task when he knows nothing about the organization and was never given any notice of any hearing at which the organization was listed. Will his statement under oath that he never believed, advocated nor taught the doctrine that the Government of the United States should be overthrown by force or violence be sufficient to permit him to retain his position? Will his statement under oath that he does not espouse the principles and aims of the organization be a sufficient explanation? Nowhere, either in the Act itself or in the Regents' rules, is there any provision defining what testimony given by an employee will be sufficient to overcome the *prima facie* inference or presumption.

The attempt by the Court of Appeals to sustain the validity of the presumption of guilt created by the statute is tantamount to judicial legislation. The existence of the statutory inference or presumption forbids the unquali-

fied or independent judicial review of the essential facts found by the Board of Regents in orders, dismissing or disqualifying teachers. The rights to basic constitutional freedom are still amenable to a non-expert administrative body whose findings are made *prima facie* evidence and the statutory requirements for the introduction of such evidence upon a judicial hearing prevents new, independent findings by the reviewing court as to whether suspension or exclusion of the teacher is fair and reasonable in contradiction of the adjudicated principle upholding the guarantee of corporate property rights (*Staten Island Edition Co.* v. *Maltbie, supra*).

Unconstitutional conditions may not be affixed by a State to the exercise within her borders of rights guaranteed by the Constitution of the United States (*Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583; cf. Gerald Henderson, The Position of Foreign Corporations in American Constitutional Law, 143 ff.).

The opinion delivered for the Court in 1892 by Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216, is wholly misleading in respect of the frequently quoted sentence therefrom (220):

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

The decision, in fact, turned upon the finding that the officer had violated a Civil Service rule forbidding him to engage in party politics.

The power of a State to qualify constituional rights by the exercise of the incidents of public ownership (*Davis* v. *Massachusetts*, 167 U. S. 43) was sharply distinguished, and inferentially questioned, in *Hague* v. *C. I. O.*, 307 U. S. 496, 514-516. The *Davis* case *supra*, had affirmed the judgement of conviction rendered in *Commonwealth* v. *Davis*,

162 Mass. 510, again through an opinion delivered by Mr. Justice Holmes upon analogy to the *ratio decidendi* of the *McAuliffe* case, *supra* (162 Mass. *supra*, 511). Hence, it is obvious that the premise upon which the *McAuliffe* case rests can no longer be applied unhesitatingly to a man who pursues a calling that is not expressly protected, as teaching is, by the First and Fourteenth Amendments; especially, as the guarantees contained therein have been expanded since 1919 (cf. the respective dissenting opinions of McReynolds and Butler, JJ., in *Hague* v. *C. I. O.*, *supra*, 532, 533, with *Palko* v. *Connecticut supra*).

This modern evolution of the Fourteenth Amendment with reference to the *McAuliffe* case, *supra*, accentuates the subsequent warning uttered by Mr. Justice Holmes in *Jackman* v. *Rosenbaum*, 260 U. S. 22, 31:

> "Such words as 'right' are a constant solicitation to fallacy."

In this same vein, Frank J., concurring upon all grounds, but one, in *United States* v. *Sacher*, 182 F. 2d, 416, stated in part (462):

> "To yank Holmes' phrases from their settings and then to employ them as bludgeon-like, thought stopping, slogans, traduces some of Holmes' strongest convictions: Objecting to just such misapplication of a well-known judicial utterance, he remarked, 'It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis' (footnote citation: *Hyde* v. *United States*, 225 U. S. 347, 384, 391 * * *)."

This is patently true of the *McAuliffe* case, *supra*, decided in the early 1890's, when Civil Service Reform was at last, though almost imperceptibly, undermining the "spoils system" as the accepted prerogative of the political henchmen to enjoy office in reward for partisan activity

(Carl Russell Fish, The Civil Service and the Patronage (1905) 225).

United Public Workers v. *Mitchell*, 330 U. S. 75 rests upon the same principle as the *McAuliffe* case, *supra*, in sustaining the validity of the prohibitions of the Hatch Act against the participation by civil service employees in organized politics. Mere membership in a political party was excluded by construction from the coverage of the act. Mr. Justice Reed clarified the holding of the Court (100):

> "It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns."

To extend the *Mitchell* and the *McAuliffe* cases to sustain a statutory prohibition against membership in an organization is a misreading of those authorities (*cf. Osaka Shosen Line* v. *United States*, 300 U. S. 98, 103, quoting *Cohens* v. *Virginia*, 6 Wheat. 264, 399).

Further, the more recent precedents subjecting federal employees to removal upon investigation by loyalty boards are also inapposite. Unlike teachers, neither the executive, legislative nor judicial officers of the United States have their tenure guaranteed against an Act of Congress under any plausible argument derived from due process. So far as concerns the judges who are appointed to constitutional courts by virtue of Article III of the Constitution, its provisions safeguard them alone from removal during good behavior (James M. Landis, The Administrative Process, 19, 20).

The statute does not have any precedent to support it under the Fourteenth Amendment. In relation to civil rights, the presumption of constitutionality accorded to a state enactment requires greater scrutiny by the courts when the legislative measure qualifies the guarantees of the First Amendment (Frankfurter, J., concurring in *Kovacs*

v. *Cooper*, 336 U. S. 77, 90 ff.). While this result, was achieved in correcting the suggestion, improperly derived from *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4, that a measure of this type might have to surmount a presumption of unconstitutionality, the significance of the correction lies in its revelation of a definitive departure from the principle of construction enunciated by James Bradley Thayer, notably where school affairs were the subject of debate (see Frankfurter, J., dissenting in *Board of Education* v. *Barnette*, 319 U. S. 624, 659, 666-670), that the vindication of civil rights was subject to the outcome of popular elections.

The undefined grant of legislative authority to the Board of Regents, an administrative agency, to promulgate rules without observing the differentiation between prosecuting and adjudicating powers of the administrative is still a further basis, for invalidity (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388).

The Act is also too indefinite to furnish a standard for laymen to administer in the determination of what is *prima facie* evidence of disloyalty (*cf. People* v. *Grogan*, 260 N. Y. 130); especially where the Courts disagree as to the interpretation of the statute (*cf. Cole* v. *Arkansas*, 338 U. S. 345).

A body, inexpert at construing a statute, could not avoid being influenced by the apparent incorporation by reference into the statute of section 3021 of the Education Law with its provisions for removal of persons for treasonable acts and utterances. New York cannot punish treason against the United States (*People* v. *Lynch*, 11 Johns. R. 549, I. Elliot's Debates on The Federal Constitution, 344, 382, 383; The Federalist, No. 43; Willard Hurst, Treason in the United States, 58 Harvard Law Review, I 226; II *ibid.*, 395; III, 806).

The Fourteenth Amendment, as now supplemented by

Cramer v. *United States*, 325 U. S. 1, guarantees that mere membership in any party or organization would not be the overt act requisite to punish or discipline or remove a teacher for treasonable acts or utterances (Hurst, II *supra*, 405, 406, 444; III, *ibid.*, 806, 807).

Under the plain wording of the last two sentences of subdivision 2 of Section 3022, the listing derived from the federal agencies may furnish the basis for *prima facie* evidence of disqualification against the employee of the educational system of the State of New York.

This result violates Article III, Section 1, of the State Constitution by delegating legislative authority to federal officials (*Darweger* v. *Staats*, 267 N. Y. 290). It is likewise at variance with the Ninth Amendment of the Constitution of the United States in disparaging rights retained by the People of the State of New York. It finally impairs the guarantee of due process of law contained in the Fifth Amendment of the Constitution of the United States by supplying the basis for federal agencies through *ex parte* procedure to create *prima facie* evidence of disqualification against employees of the educational system of this State through simultaneous violation of the Tenth Amendment of the Federal Constitution. Mr. Justice White in *McCray* v. *United States*, 195 U. S. 27, asserted (p. 61):

> "The Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, * * *."

Constitutional principles should not be bent regardless of the exigency. In *Matter of Doyle*, 257 N. Y., 244, Cardozo J., stated (268):

> "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, J., in Northern

Securities Co. v. United States, 193 U. S. 197, 400), are not to change their forms and content in response to the 'hydraulic pressure' (Holmes, J., *supra*) exerted by great causes. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."

Point II

The Statute Is a Denial of Adjective Due Process in Providing for a Presumption of Guilt, and Guilt by Association, and is a Bill of Attainder and Ex Post Facto Law.

The creation by the legislature of a presumption of guilt to prove the unlawful advocacy of the overthrow of the government by adherence or association or membership in a listed organization establishes another reason why the statute is unconstitutional.

Precisely how far the legislature may go in changing the modes and forms of judicial or administrative proceedings is not necessarily relevant here, but this Court should have no hesitancy in holding that the legislature cannot subvert the fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty. This is a rule which is part of that brief but significant phrase "due process of law."

At common law the legal presumption would be directly the reverse declared by the statute. Where the common law would presume innocence the statute presumes guilt. Either the guarantee of a trial according to the common law is a nullity, or the provision of the statute is void. This fundamental rule of evidence which in England and this country has been generally deemed essential to the due administration of justice and which has been acted

upon and enforced by every court of common law for centuries, is placed by the constitution beyond the reach of legislation. It is a rule which reason applies to the investigation of truth and is of course in its nature unchangeable and must necessarily be included in "due process of law". If this is not the true interpretation of the constitution, if the legislature, in addition to declaring what acts and what intentions shall be proscribed can also dictate to the courts the evidence, and change a legal presumption upon which a conviction may be had there is no barrier to legislative despotism; and the separation of the legislative and judicial departments of the government and the guarantee of a trial according to the common law have all failed to afford any substantial security to individual rights.

The leading authorities withhold definitively from a state the power to provide for personal guilt in advocating the overthrow of the government by force or violence or other unlawful means upon the basis of attendance at, or participation in a meeting of, or membership in, an organization the aims of which are known, or are necessarily deemed to be, subversive (*Schneiderman* v. *United States*, 320 U. S. 118 *DeJonge* v. *Oregon*, 299 U. S. 353). Without more a legislative enactment so providing is unconstitutional as vague and indefinite (*Schneiderman* v. *United States*, *supra*; *Herndon* v. *Lowry*, 301 U. S. 342).

Consequently, at law or in equity or in the domain of administration, there can be no rationale between an act, guaranteed and safeguarded by the Constitution of the United States, and the ultimate presumption of wrongdoing founded upon the performance of, and persistence in, such a rightful step. It is the lack of such rationale that destroys any appropriate standard for affixing guilt in the Feinberg Act. (*Schneiderman* v. *United States*, *supra*; *Herndon* v. *Lowry*, *supra*; *DeJonge* v. *Oregon*, *supra*; *cf Winters* v.

United States, 333 U. S. 507; *Manley* v. *Georgia*, 279 U. S. 1; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *United States* v. *Cohen Grocery Co.*, 225 U. S. 81, 92; *People* v. *Grogan*, 260 N. Y. 130; *People* v. *Mancuso*, 255 N. Y. 463).

The provisions for permitting the ultimate presumption of guilt by association to be drawn against teachers for past or present membership in an organization listed as subversive, is unconstitutional. Guilt by association is universally discountenanced by binding decision and accepted text even in prosecutions for criminal conspiracy (*Kotteackos* v. *United States*, 328 U. S. 772; *Sayre*, Criminal Conspiracy, 36 Harvard Law Review 393, *supra*).

Underlying that thoroughly alien concept (John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harvard Law Review, *supra* 599) rests the unbridled jurisdiction of the Board of Regents to prosecute through its untrammeled choice in determining what organizations to list as subversive. Kenneth Culp Davis in his recent treatise on Administrative Powers, 63 Harvard Law Review 193, virtually at its outset, quotes Landis, The Administrative Process 110 (1938), as follows:

> "(T)he charge of arbitrariness, which is commonly made against administrative action, usually appertains to the exercise of the power to prosecute rather than to the power to adjudicate. It is restraints upon the exercise of that power that in my judgment are of far greater significance than the adjudicate."

The laborious attempt by the Board of Regents to rewrite the provisions of the Feinberg Act by its rules indicated its own doubt of the validity of the Act and resulted in Rules as invalid and unconstitutional as the Act itself.

The Feinberg Act, Section 3022, subdivision 2, provides in part as follows:

> "The Board of Regents shall provide in the rules and regulations required by subdivision one hereof

> that *membership* in any such organization included in such listing made by it *shall constitute prima facie evidence of disqualification* for appointment to or retention in any office or position in the public schools of the state." (Italics supplied.)

The vague and indefinite character of the quoted provision of the Feinberg Act was recognized by the Board of Regents. They therefore attempted to rewrite the Act materially in promulgating the rules; and thereby acted in excess of the authority purportedly granted to them by the Legislature and in direct conflict with the provisions of the Act.

This interpretation by the body chiefly responsible for the administration of the Act, confirms the conclusion that it is vague and indefinite.

The Regents' Rules (ff. 102, 103) purportedly adopted in pursuance of the aforesaid Act provides as follows:

> "Evidence of membership in any organization so listed on or *after* the tenth day subsequent *to the date of official promulgation of disqualification* for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." (Italics supplied.)

The said italicized words of subdivision 2 of the Act, i.e., "*membership * * * shall constitute prima facie evidence of disqualification*" can only mean "*membership at any time*": membership in the past, membership in the present and membership in the future.

The Regents' Rules, recognizing the viciousness of the Act, carefully ignore the language of the statute and substitute for the *past* and *present membership provisions* the

following: "membership after the *tenth day* subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification."

The Regents, appreciating that to eliminate altogether past and present membership would further distort the statute provided in their rule: "evidence of membership * * * prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith."

The Regents' Rules say in effect as follows: You may be disqualified unless you resign ten days after we tell you that an organization is blacklisted by us. Even then the Regents' own rule becomes a legal nullity because in the event that an employee or teacher, afraid to face the wrath of the rule, shall *resign from the blackballed organization* he is still between Scylla and Charybdis since Regents could still find, conclusively, that such resignation was not made "in good faith." Conclusive it must be, as far as the disqualification of the employee or teacher is concerned. (*Tompkins* v. *Board of Regents, supra.*) How an accused can prove "good faith" to the satisfaction of an accuser, is beyond all ken.

The right to teach is protected by the Constitution and laws of the United States (*Meyer* v. *Nebraska*, 262 U. S. 390; Brandeis concurring in *Whitney* v. *California, supra*, 373 (Holmes concurring with him);

Despite this, the Feinberg Act provides for a presumption against the enjoyment of these rights whenever a teacher or other individual employed in the educational system of the State of New York belongs to an organization which the Regents decide to be subversive.

In order for the presumption of guilt to be legal, there must be a rational relation between the fact proved and the fact presumed (*Mobile, J. & K. C. R. R. Co.* v. *Turnip-*

seed, 219 U. S. 35; *People* v. *Pieri*, 269 N. Y. 315). Even if that relationship has been established, the burden of proof may not be shifted from the state to the defendant.

This rule of the common law, however, is abrogated by the statute. The finding of guilt thereunder would receive the limited review accorded to an administrative determination. Such review is limited to errors of law alone; the courts determining not whether the record would "convince" one of the facts found by the administrative agency but only whether a reasonable man might so find (*Tompkins* v. *Board of Regents*, 299 N. Y. 469; *Friedel* v. *Board of Regents* 269 N. Y. 347).

Whether the Feinberg Act gives rise to a rebuttable presumption or is a rule of substantive law stated in evidential language (Chafee, Progress of the Law, 35 Harvard Law Review 302, 311), its functional role is to put a teacher or other employee at a disadvantage in sustaining his defense.

In *Kring* v. *Missouri*, 107 U. S. 221, the following charge that had been delivered by Mr. Justice Washington in *United States* v. *Hall*, 2 Wash. 366 aff'd 6 Cranch 171, was quoted with approval by Mr. Justice Miller for a majority of the Court (p. 228):

> "(A)n *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment or in *short, which, in relation to the* offence or *its consequences, alters the situation of a party to disadvantage.*" (Italics supplied by Mr. Justice Miller.)

The Feinberg Act is an *ex post facto* law within the final category thereof as described in *Calder* v. *Bull*, 3 Wall 386. This definition was quoted with approval by both the pre-

vailing and dissenting opinions in *Kring* v. *Missouri*, 107 U. S., *supra*, 228:

> "4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

The Feinberg Act unquestionably has the consequence through its provision for *prima facie* evidence of making more difficult a defense to the charge of being a member of a subversive group and manifestly is an *ex post facto* law with its provision for "prima facie evidence."

The Court of Appeals was in error in reading the Preamble out of the directive provisions of the statute to save it from being held to a Bill of Attainder (see *United States* v. *Lovett*, 328 U. S. 303). The Preamble is as much an enactment of the legislature as the other portions of the statute and cannot be disregarded. The Preamble expresses the policy of the legislature and any ambiguity in statutory construction compels resort to it. The Court of Appeals erroneously held that "such preamble enacts nothing, contains no directives and, as we have seen, is not made part of the Education Law." The Preamble contains a specific direction in the following terms: "To this end the Board of Regents, which is charged primarily with the responsibility of supervising the public school system in the State, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature." A more specific directive to the Board of Regents to do the bidding of the legislature as provided in the Preamble cannot be envisaged.

The deprivation of employees of their positions by this enactment through the wholly unlawful imposition by legislative fiat of guilt by association without a judicial trial or

of the protection afforded thereat by the principles of evidence at common law, is a bill of attainder. In *Cummings* v. *Missouri*, 4 Wall 277, it was held (321, 322, 323):

> "In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.
>
> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial.
>
> "If the punishment be less than death, the act is termed a bill of pain and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms of safeguards; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

In *United States* v. *Lovett*, 328 U. S. 303, 316, it was asserted:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."

The action of the Board of Regents in making a list of subversive organizations at the direction of the Legislature is tantamount to specific legislation by the Legislature, from which it derives its powers. The Legislature cannot avoid the invalidity of the Act by thus delegating these powers to the Board of Regents.

The Law must be condemned as a bill of attainder, however it may be disguised.

Cummings v. *Missouri*, states, *supra* 325:

> "* * * The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

The respective guarantees against Bills of Attainder, *ex post facto* laws provided by Article 1 Section 10 of the Constitution of the United States are among the privileges and immunities of citizens safeguarded by Section 1 of the Fourteenth Amendment (*Maxwell* v. *Dow*, 176 U. S. 581, 582; *Slaughterhouse* cases, *supra*, 77, 96, 118, 127) and are not subject to regulations under the police power (*Twining* v. *New Jersey*, 211, U. S. 78, 97; Charles Warren, The New Liberty Under the Fourteenth Amendment, 39 Harvard Law Review, 463).

The police power of the State is capable of removing subversive persons from the school system by indictment and trial of offenders under section 161 of the Penal Law. To attempt to achieve this object by administrative procedure either under the Feinberg Act or section 12-a of the Civil Service Law is to violate the applicable guarantees of due process. (*cf. Osmund K. Fraenkel, Can The*

Administrative Process Evade The Sixth Amendment? 1 Syracuse Law Review, 173, 183, 184).

For all the foregoing reasons this appeal should be allowed.

Respectfully submitted,

FRED G. MORITT,
EDWARD J. ENNIS,
Attorneys for Appellants.

APPENDIX A

OPINION OF MR. JUSTICE SCHIRICK.

SUPREME COURT—COUNTY OF ALBANY.

Case No. 1 argued at Albany Special Term, September 23, 1949.

ROBERT THOMPSON, as Chairman, and WILLIAM NORMAN, as Secretary of the Communist Party of the State of New York, *Plaintiffs,*

against

WILLIAM J. WALLIN, JOHN P. MYERS, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, JACOB L. HOLTZMAN, W. KINGSLAND MACY, STANLEY BRADY, EDWARD R. EASTMAN, WELLES V. MOOT, CAROLINE WERNER GANNETT, JOHN F. BROSMAN, GEORGE L. HINMAN and DOMINICK F. MAURILLO, comprising the BOARD OF REGENTS OF THE STATE OF NEW YORK, *Defendants.*

Case No. 2 argued at adjourned Ulster Special Term, October 14, 1949.

In the Matter of

The Application of CHARLES L'HOMMEDIEU, JOHANNA M. LINDLOFF, LUCILLE SPENCE, SAMUEL C. GREENFIELD and EMMA SCHWEPPE, *Petitioners,*

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, consisting of WILLIAM J. WALLIN, JOHN P. MYERS, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, W. KINGSLAND MACY, EDWARD R. EASTMAN, WELLES V. MOOT, CAROLINE WERNER GANNETT, DOMINICK F. MAURILLO, JOHN F. BROSMAN and JACOB L. HOLTZMAN; THE UNIVERSITY OF THE STATE OF NEW YORK, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York, *Respondents.*

For an Order Pursuant to Article 78 of the Civil Practice Act.

Decision rendered, November 28, 1949.

Unger, Freedman & Fleischer, Esqs., for plaintiffs in Action No. 1.

Nathaniel L. Goldstein, Attorney General of the State of New York, for defendants in Case No. 1 and Case No. 2. Wendell P. Brown, Solicitor General, Ruth Kessler Toch and Kent H. Brown, Assistant Attorneys General, of counsel.

Fred G. Moritt, Esq., for petitioners in Case No. 2. Frederic A. Johnson and Morris Eisenstein, Esqs., of counsel.

Pressman, Witt & Cammer, Esqs., for Teachers Union, Local 555, *amicus curiae*.

Will Maslow, Esq., and Shad Polier, Esq., for American Jewish Congress, *amicus curiae*.

Samuel M. Birnbaum, Esq., for American Legion, Department of New York, *amicus curiae*.

Ralph Shapiro, Esq., for International Fur and Leather Workers Union, *amicus curiae*.

Morris Zuckman, Esq., for American Labor Party, *amicus curiae*.

Michael B. Atkins, Esq., Howard N. Meyer, Esq., and Herbert I. Silverman, Esq., for National Lawyers Guild, *amicus curiae*.

Mr. Arthur C. Buck, as president of Association of Teachers of Social Studies, *amicus curiae*.

OPINION.

(Schirick, J.)

Chapter 416 of the Laws of 1917 introduced into our law a provision which now constitutes Section 3021 of the Educational Law. It reads as follows:

> "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Twenty-two years later the Legislature enacted Chapter 564 of the Laws of 1939, which has become Section 12-a of our Civil Service Law. This provision is as follows:

> "No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals, or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be over-thrown or over-turned by force, violence or any unlawful means; or (b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be over-thrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrines contained therein; (c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means; (d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court

with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

With the foregoing provision in mind, the Legislature at its last session enacted a further statute which has become known as the "Feinberg Law". This is Chapter 360 of the Laws of 1949, the material parts of which are hereby quoted:

"Section 1. The legislature hereby finds and declares, that there is common report that members of subversive and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the

schools by conduct in the classroom: The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

"Section 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

"Section 3022. Elimination of subversive persons from the public school system. 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the ground set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or

embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or over-turned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

The Feinberg Law is now challenged, as regards its constitutionality, in two cases pending before this Court. For convenience, they will be referred to as Case No. 1 and Case No. 2, respectively.

Case No. 1 is an action brought by Robert Thompson, as chairman, and William Norman as secretary, of the Communist Party of the State of New York for a declara-

tory judgment that the Feinberg Law is unconstitutional. The defendants in the action are William J. Wallin and others comprising the Board of Regents of the State of New York. The action also seeks an injunction restraining the Board of Regents from enforcing any provision of the Feinberg Law and especially from preparing and publishing a list of subversive organizations thereunder. The plaintiffs have moved, in such action, for a temporary injunction, and a cross-motion has been made by the defendants for judgment on the pleadings declaring the statute to be in all respects constitutional and valid, and dismissing the complaint upon the merits.

Case No. 2 is a proceding brought pursuant to Article 78 of the Civil Practice Act. The petitioners therein, with the exception of Johanna M. Lindlof, are employees of the New York City school system, said Johanna Lindlof having retired from such employment and now being a member of the pension system thereof. Their petition seeks relief similar to that of the plaintiffs in Case No. 1, namely, for an order directing the Board of Regents and others to desist from taking any action pursuant to the Feinberg Law and to treat the same as a nullity, upon the ground that it is unconstitutional.

While procedurally diverse, the two cases raise but a single substantive issue, namely, the constitutionality of the Feinberg Law. With laudable directness, and a desire that the basic issue be adjudicated, the parties have refrained from dilatory tactics. Public interest and the welfare of our educational system require a decision as to the validity of the Feinberg Law. The court launches its inquiry in that spirit and, with the cooperation of the litigants, has hurdled various procedural blocks which might otherwise impede or delay a decision upon the merits.

While attack has been directed solely at the latest enactment, it is apparent that the Feinberg Law, in large measure, is an implementation of the earlier statutes. Paragraph 3 directs the Board of Regents to take steps to disqualify and remove teachers who violate the provisions of the earlier statutes. Even the paragraph which directs the listing of subversive organizations, which has been

described as the only substantive addition made by the Feinberg Law, is no more than an additional legislative procedure in an effort to render more complete the enforcement of the antecedent statutes. It is inevitable, therefore, that Section 3021 of the Education Law and Section 12a of the Civil Service Law must be given consideration in passing upon the validity of the 1949 enactment. In such consideration, little weight can be given to the circumstance, emphasized by counsel, that the one has not been challenged for 22 years, and the other for the 10 years, of its existence. Old or new, no statute is immune when challenged as transgressing constitutional limitations.

The attack upon this legislation is a broad one, and many constitutional provisions, federal and state, are cited against it. Among these are the following:

The 9th and 10th amendments to the United States Constitution relative to powers reserved to the people.

Article 1 of the New York Constitution and the first amendment to the United States Constitution relative to freedom of speech, press and assembly and the right to petition for a redress of grievances.

Article 1 of the New York Constitution and the 14th amendment to the United States Constitution relative to deprivation of liberty and property without due process of law.

The provisions of the foregoing article and amendment relative to the equal protection of the laws.

Article V, Section 6 of the New York Constitution relative to standards of public employment and subjective tests of merit and fitness therefor.

Article XIII, Section 1 of the New York Constitution relative to oaths of office.

Article 1, Section 10 of the United States Constitution relative to bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts.

In support of the statute, the Attorney General of the State of New York and *amicus curiae* supporting his position assert that employment in the public schools is a privilege, not a right guaranteed by the Constitution; that the State has the right to select its personnel; and that,

in doing so, it may determine qualifications and fix standards. The court is referred to the oft-quoted words of Mr. Justice Holmes, while on the Supreme Judicial Court of Massachusetts, in *McAuliffe* v. *Mayor*, 155 Mass. 216:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Words must, of course, be read in their context, and the quotation cannot be extended beyond the facts in the *McAuliffe* case. To do otherwise would do violence to the long struggle for the preservation of constitutional liberties with which the name of Mr. Justice Holmes was so long and so closely linked. The issue is not whether there is a constitutional right to teach, but whether the ground asserted for denying this right or privilege, whatever it is, is one which is protected by the constitution against legislative encroachment. It is presumed that no one would contend that the state could validly provide, as a condition of public employment, that the applicant refrain from worship except in a stated church. Such law would be invalid not because of any constitutional right to public employment but because the Constitution protects freedom of religion and does not countenance its invasion either directly or by indirection.

Many of the cases which illustrate this doctrine.

United States v. *Lovett*, 328 U. S. 303 (1946), involved the validity of an act of Congress whereby three named individuals, whose loyalty had been questioned by the House Committee on Un-American Activities, were forever barred from government employment. The contention was there put forth, as here, that these men had no constitutionally protected right to their positions. It did not prevail. Such "permanent proscription from any opportunity to serve the Government", said the Court, "is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes * * *." (page 316). The legislative procedure was held to constitute a bill of

attainder, and the proscription from government employment nullified.

Answering another contention, which is now made in support of the Feinberg Law, that it penalizes no one and inflicts no punishment, the opinion of Mr. Justice Black points out that the statute under consideration, in cutting off Lovett's salary, is no less odious than if it characterized his conduct as criminal. It inflicts punishment and amounts to the same thing.

Writing for our own Court of Appeals, Judge Cardozo answered a similar contention in *People* v. *Crane*, 214 N. Y. 154 (1915):

> "* * * we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state. * * * We do not hold that it may discriminate among its citizens on the ground of faith or color. * * * For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. *It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare.*" (Italics supplied) Page 167.

This Court concludes that the interest of the complaining parties herein, as regards their eligibility to hold a school position, is sufficient to give them standing to question validity of the Feinberg Law; and further that such eligibility enjoys constitutional status and protection of which one may not be deprived upon grounds or by procedures which violate our basic law.

This should not be construed, of course, as in any way affecting the undoubted power of the State and its creation, the Board of Regents, to set up qualifications for school personnel. Any test bearing reasonable relation to

the fitness of an applicant or incumbent to teach our children may of course be applied and administered. Manifestly such qualifications include not only scholastic attainment and technical skill. The state may go further, and reasonably require that those whom it employs to guide its young be men and women of sound character, and imbued with a love of our traditions and democratic heritage. Such tests, properly applied, do not contravene the Constitution.

United Public Works v. *Mitchell*, 330 U. S. 75 (1946).
In re Summers, 325 U. S. 561 (1945).
Hawker v. *New York*, 170 U. S. 189 (1898).

The power to fix and determine the qualifications of its employees must, however, like other governmental powers, be exercised in a manner which does not transgress the limitations which the Constitution has placed upon all powers of government. In exercising this prerogative, the Legislature may not pass a bill of attainder or *ex post facto* law; it may not abridge freedom of speech or assembly; it may not act without due process of law; it may not abridge the privileges and immunities of citizens; nor may it deny to any citizen equal protection of the laws.

Whether any of these things has been done by the Feinberg Law is the basic issue in these cases.

I. Is it a bill of Attainder?

Although decided in 1866, *Cummings* v. *Missouri*, 4 Wall (U. S.) 277, is still the leading case upon this subject. A bill of attainder is therein described as "a legislative act which inflicts punishment without a judicial trial." If the punishment be less than death, it is termed a bill of pains and penalties, equally proscribed by the Constitution. "In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes * * * judicial magistracy; it pronounces upon the guilt of the party without any of the forms of safeguards or trial."

Such bills may be directed against individuals by name, or against a whole class.

The *Cummings* case also defines *ex post facto* laws, with which a bill of attainder is closely associated. This is a law which imposes punishment for an act not punishable at the

time it was committed. It includes acts which "impose additional punishment to that prescribed when the act was committed", or "changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

The *Cummings* case and its companion, *Ex Parte Garland* 4, Wall (U. S.) 333, make it clear that perpetual exclusion from government employment is punishment.

> "Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts or acting as an executor—may also, and often has been, imposed as punishment."
> *Cummings* v. *Missouri, supra,* at p. 320.
> See also *United States* v. *Lovett, supra,* at p. 316.

With such decisions as a background, we turn to the Feinberg Law.

Section 1 twice refers to the Communist Party by name. It refers to the "common report" that the Communist Party has infiltrated into the schools, with the result that subversive propaganda can be disseminated among the children, with certain evil consequence. Then it declares it essential that laws prohibiting persons who are members of subversive groups, "such as the communist party"; from employment in the schools be rigorously enforced. The Board of Regents is therefore admonished to take affirmative action to meet the menace.

While the statute refers to "statutes" on the books to cope with the situation, it is to be noted that no previous legislation singled out the Communist Party by name or outlawed its activities. Section 3021 of the Education Law made reference to "treasonable or seditious" words or acts. The Civil Service Law, Section 12a, concerned itself with the doctrine of the overthrow of government "by force, violence or any unlawful means."

Section 1 of the Feinberg Law must be read in its context, as a part of the whole, and in conjunction with Section 3, subdivision 2, directing the Regents to list subversive

organizations. Thus read, the conclusion is inescapable that the board of regents is directed and required to list the Communist Party as a subversive organization, with all the consequences thereto, and to its members, which the statute prescribes. Previously they had been commanded to enforce the 1917 statute against the Communist Party, and to implement such command, the Regents are told to list seditious organizations "such as the Communist Party." In the absence of proof, it will not be presumed that membership in such party bears any logical relation to such members' fitness as teachers. Lacking such proof, and none is required by the statute, it follows that the disqualification must be considered as punishment.

The statute therefore violates the constitutional proscription of bills of attainder. It is a legislative finding of guilt of advocating the overthrow of government by unlawful means without a judicial trial, and without any of the forms and guards provided for the security of the individual by our traditional judicial forms.

II. Does it violate the "due process" clause?

It is now a well established constitutional doctrine that the Bill of Rights amendments to the United States Constitution have been made applicable to the states by the Fourteenth Amendment. No more than Congress are state legislatures permitted to interfere with the free exercise of religion, to abridge the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for redress of grievances.

Saia v. *New York*, 334 U. S. 558 (1948).
Bridges v. *California*, 314 U. S. 252 (1941).
Cantwell v. *Connecticut*, 310 U. S. 296 (1940).
Thornhill v. *Alabama*, 310 U. S. 88 (1939).
Lovell v. *Griffin*, 303 U. S. 444 (1938).
Palco v. *Connecticut*, 302 U. S. 319 (1937).

These basic civil rights have a "preferred position in our basic scheme."

Prince v. *Massachusetts*, 321 U. S. 158, 164 (1944).

They enjoy a greater degree of protection than the rights which stem solely from the Fourteenth Amendment. While a mere "rational connection" may suffice to satisfy the latter, a showing of clear and present danger is usually required to justify a restriction of the rights guaranteed by the Bill of Rights and extended to state action by the later Amendment.

Board of Education v. *Barnette*, 319 U. S. 624 (1943).

Whether or not the court must find clear and present danger to exist within the doctrine of the *Schenck* case (249 U. S. 47) where the legislature has made such finding does not appear to be free from doubt. (Compare *Gitlow* v. *New York*, 268 U. S. 652 and *Whitney* v. *California*, 274 U. S. 357, with *Thomas* v. *Collins*, *supra*, *Board of Education* v. *Barnette*, *supra*, and *Herndon* v. *Lowry*, 301 U. S. 242):

That power exists in the government to proscribe and punish words which instigate and incite its overthrow by violence cannot be denied.

Whitney v. *California*, *supra*.
Gitlow v. *New York*, *supra*.
Dunne v. *United States*, 138 Fed. 2nd 137 (1943) (cert. den., 320 U. S. 790, 814).

Whether, in a specific instance, such power has been validly exercised remains, however, a judicial question, and one to be approached from a point of view which honors the long liberal traditions and philosophy which are the core of our democracy. Legislation abridging freedom of speech, of the press, or of assembly, do not come to judicial scrutiny with any presumption in their favor. *Board of Education* v. *Barnette*, *supra*. *Thomas* v. *Collins*, *supra*.

That liberal tradition and philosophy have found eloquent expression in the opinions of the highest tribunal in the land. The dissents of an earlier day have not infrequently become accepted doctrine of later decisions.

The dissenting opinion of Mr. Justice Brandeis, in *Whitney* v. *California (supra)*, in which he was joined by Mr. Justice Holmes, bears repetition whenever times of stress

provoke extraordinary measures to combat ideas deemed dangerous to our society.

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. * * *

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the

power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

The philosophy expressed in this dissent finds majority expression in later cases. Similar in purpose is the expression of Mr. Justice Jackson in *Thomas* v. *Collins, supra:*

"The case confronts us again with the duty our system places on this court to state where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * *

"* * * It is therefore in tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. * * *" (pages 529-530)

And in *Board of Education* v. *Barnette*, *supra*, the Court again emphasized the over-all importance of such basic rights:

> "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentric and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (pages 641-642)

Legislation which penalizes the free expression of views or espousel of doctrines must receive, therefore, the closest judicial scrutiny. Such is the nature of the Feinberg Law, and in such manner must it be considered.

A. *Vagueness.* A statute which penalizes an activity must be definite and certain in its application. It must fix a "reasonably ascertainable standard of guilt." *Herndon* v. *Lowry*, *supra*. It "must afford some comprehensive guide, rule, or information as to what must be done and what

must be avoided, to the end that the ordinary member of society may know how to comply with its requirements." *People* v. *Grogan*, 260 N. Y. 138, 145. To inflict a penalty in the absence of such definite standard is a denial of due process. *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 92; *Winters* v. *New York*, 333 U. S. 507.

There is nothing indefinite or vague about the doctrine of overthrow of the government by force, violence, or other unlawful means. The use of such standard has been judicially sanctioned, and the words have acquired a clear meaning. *Whitney* v. *California, supra; Gitlow* v. *New York, supra; Dunne* v. *United States, supra.*

As heretofore pointed out, however, the Feinberg Law incorporates within itself, and directs the Board of Regents to implement certain antecedent statutes. One of these is Section 3021 of the Education Law, which penalizes by disqualification any school employee who utters "any treasonable or seditious act." It is this provision, among others, which the Board of Regents is directed to enforce, and it is for this, among others, that a listing of "subversive" organizations is required.

In the opinion of the court, this statute fails entirely in establishing a definite standard of proscribed conduct. It is a "dragnet which may enmesh anyone who agitates for a change of government." *Herndon* v. *Lowry, supra*, at page 263. Obviously these words are employed in no technical sense. In such sense, treason can be committed only against the United States. The Constitution is very explicit upon this point, (Article III, section 3, Constitution of the United States) and specifies that treason can consist only in levying war against the United States, or in adhering to their enemies. No conviction may be had unless on the testimony of two witnesses to the same overt act or on confession in open court. If common usage is intended, the words "treasonable" and "seditious", are not different from "subversive". Aside from a general impression they impart that the speaker's attitude is hostile and disapproving, they connote little that is definite or precise. They mean different things to different people. What was said by

Mr. Justice Jackson, when Attorney General, concerning the word "subversive" has equal application here:

> "Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive' ".

Of this statute it may be said as it was in another connection in *Musser* v. *Utah*, 333 U. S. 95, 97:

> "This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes fail of their purpose if they do not establish some reasonable standards of guilt. * * * Legislation may run afoul of the due process clause because it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

The force of these words is not avoided by pointing out that the Feinberg Law is not penal in its terms. The forfeiture which it involves is punishment of serious nature, and constitutional safeguards must play their part. *Cummings* v. *Missouri, supra.*

B. *Procedural Due Process.* The Feinberg Law sets up a new administrative technique whereby the rights of school personnel are to be determined. This procedure has been attacked, and the court must scrutinize it to determine whether it meets the requirements of due process.

Such requirements were recently reiterated by the Supreme Court of the United States in *Morgan* v. *United States*, 304 U. S. 1 (1937):

> "The vast expansion in this field of administrative regulation is made possible under our system by ad-

herence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative procedure of quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing', * * * essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'. * * * (pages 14-15)

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. * * * (page 18)

"Congress in requiring a full hearing had regard to judicial standards, not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (page 19)

Our own Court of Appeals had occasion to apply some of these rules in connection with the State Recovery Act, in *Darweger* v. *Staats*, 267 N. Y. 290. A statute which gave a federal code of fair business practice the force of law upon mere filing in this State was held to be invalid. It fixed no standards, provided for no hearing and was otherwise unsound administrative procedure. These defects were fatal to the legislation.

The Feinberg Law suffers from the same defect. In listing an organization as subversive, the Board of Regents is required to hold no hearing save such "as may be appropriate." Its discretion in that regard is untrammelled.

More serious is the effect of such listing, however determined, upon the individual applicant for, or incumbent of, a school position. He is given no notice of such hearing as may be had of the nature of his organization. He is

afforded no opportunity to be present, to confront witnesses, to cross-examine, to adduce evidence of his own, or to argue to the Board of Regents the merits of his organization. Nevertheless, as applied to him, such determination is given weight, not only as evidence, but as *prima facie* evidence of disqualification. The burden is then upon him to clear himself as best he can. Legally, of course, the determination of the Board of Regents, as to him is conclusory and hearsay in an ultimate degree.

The Feinberg Law fails to meet the minimum standards of fairness required of an administrative proceeding. It offers no basis for depriving any man of the basic rights and privileges of citizenship unless mere association can constitute lawful cause therefor.

Whether the statute could validly impose its penalties upon proof, in each instance, of membership in an organization advocating the overthrow of government by violence need not be now decided. (See *Dunne* v. *U. S.*, *supra*.) Suffice it to say the Feinberg Law contemplates no such proof. Proof of membership in an organization, not proven as to any particular teacher to embrace such doctrine, in itself is sufficient basis for visiting harsh consequences upon him.

The procedure thus envisaged contravenes constitutional traditions of fair play, and amounts to a denial of due process.

C. *Presumption of Guilt.* The Feinberg Law, by its terms, directs the Board of Regents to promulgate a rule to the effect that membership in any organization included in its listing as subversive shall constitute *prima facie* evidence of disqualification. Thereby is created a presumption of guilt, in direct contradition to our time honored doctrine that each man is deemed to be innocent until the contrary is proved beyond a reasonable doubt.

If such presumption can ever be effective, it must be based upon some rational connection between the fact proved and the fact inferred, so as to provide reasonable basis for the inference. A presumption that is not so based is arbitrary, and violates the due process clause.

Manley v. *Georgia*, 279 U. S. 1 (1928).

McFarland v. *American Sugar Co.*, 241 U. S. 79 (1915).
People v. *Mancuso*, 255 N. Y. 463 (1931).

Upon a hearing as to the disqualification of any individual school employee under the Feinberg Act, the fact proven would be merely membership in "X" organization, said organization being upon the Regents' list of subversive organizations. As to such individual, upon such hearing, no proof of the doctrines and program of the organization need be offered. From the mere fact of membership and listing, the entire concept of advocacy of the overthrow of government by violence must be inferred. Upon what "logical connection" is such presumption based? What is the fact proven in the proceeding, upon which the fact inferred may be based? Nothing is proven, and constitutionally nothing can be inferred. If the insolvency of a bank cannot validly raise a presumption of fraud on the part of its directors (*Manley* v. *Georgia, supra*) there is no greater support for the inference created by the statute now in question.

D. *Guilt by Association.* From what has been said, it follows that the only factual basis for disqualification under the statute is the fact of membership in an organization. As to the individual no proof of illegal purpose or action is required. Nor need an unlawful purpose or act of his organization be proven as against him. Membership alone is sufficient. This is "guilt by association" with a vengeance. As regards such doctrine, one need read but a few excerpts from decisions of the Supreme Court of the United States.

Bridges v. *Wixon*, 326 U. S. 135 (1945):

> " * * * Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly, those who joined forces with Russians to defeat the Nazis may not be said to have made an alliance to spread the cause of communism * * * (page 143)
>
> "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It par-

takes of the very essence of the concept of freedom and due process of law. * * * It prevents the persecution of the innocent for the beliefs and actions of others. * * * "

Schneiderman v. *United States*, 320 U. S. 118, (1943):

" * * * At this point it is appropriate to mention * * * that under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or to the organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles. * * * " (page 136)

DeJonge v. *Oregon*, 299 U. S. 353 (1937):

" * * * The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their crimes or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participtation in a peaceable assembly and a lawful discussion as the basis for a criminal charge.

"We are not called upon to review the findings of the State court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly, having a lawful purpose, although called by that Party. * * * " (page 365).

See also, *Herndon* v. *Lowry*, 301 U. S. 242 (1936).

Conclusion: The Feinberg Law has been attacked upon grounds other than here passed upon, but no useful purpose would be served by further analysis. It suffices to state the conclusion of the court that upon all the grounds which have been considered the legislation has been found

to contravene the provisions of the Constitutions of the United States and of the State of New York.

In reaching such conclusions, the Court is not, of course, oblivious to the practices of international communism, which have met with such universal and well-merited contempt among free men. It is not because they disapproved the evil thinkers and evil doers of their day less, but because they cherished their democracy more, that the great makers and interpreters of our constitution have so jealously guarded the basic concepts of freedom.

It is no answer to say that this measure is needed to combat the menace of Communism. Small service, indeed, to our democracy, is afforded by emulating the tactics of communism, and by destroying the guarantees of freedom.

Other, more effective means are envisaged by our free institutions, methods of combating excesses without destroying essentials. They find expression in the latest of a long series of memorable defenses of civil rights in our highest tribunal:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."
>
> Douglas, J., in *Terminiello* v. *Chicago*, 337 U. S. 1, at page 4 (1949).

The court finds it hard to believe that it is necessary to resort to witch hunting in our schools to displace mis-fits. Necessary or not, the Feinberg Law cannot be the solution, because it is an answer which the Legislature, under the Constitution, is powerless to provide.

In view of the decision herein made, various procedural objections made by the parties have become academic, and are not passed upon.

Judgment upon the pleadings is granted to the plaintiffs in Case No. 1. The petitioners in Case No. 2 are entitled to the relief requested in their petition.

Submit judgment and order accordingly.

APPENDIX B

JUDGMENT OF REVERSAL

SUPREME COURT—COUNTY OF ALBANY

In the Matter of

The Application of CHARLES L'HOMMEDIEU, JOHANNA M. LINDLOFF, LUCILLE SPENCE, SAMUEL C. GREENFIELD and EMMA SCHWEPPE, *Petitioners*,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, consisting of WILLIAM J. WALLIN, JOHN P. MYERS, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, W. KINGSLAND MACY, EDWARD R. EASTMAN, WELLES V. MOOT, CAROLINE WERNER GANNETT, DOMINICK F. MAURILLO, JOHN F. BROSMAN and JACOB L. HOLTZMAN; THE UNIVERSITY OF THE STATE OF NEW YORK, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Respondents.

For an Order pursuant to Article 78 of the Civil Practice Act.

Respondents having appealed to the Appellate Division of the Supreme Court, Third Department, from an order of the Supreme Court, County of Albany, entered in the

office of the Clerk of the County of Albany on or about December 9, 1949, and the Appellate Division, after argument and due deliberation, having ordered that the said order so appealed from be reversed on the law and the petition dismissed with fifty dollars ($50.00) costs and disbursements to appellants, and having directed the entry of the following judgment;

NOW, on motion of Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for respondents, it is

ADJUDGED, that respondents recover from petitioners the sum of fifty dollars ($50.00) costs, as ordered by the Appellate Division, and Two Hundred Sixty-eight Dollars and Seventy-five Cents ($268.75) disbursements, amounting in all to the sum of Three Hundred Eighteen Dollars and Seventy-five Cents, as taxed, and have execution therefor.

Judgment signed and entered this 15th day of March, 1950.

DONALD L. LYNCH,
Clerk.

APPENDIX C

OPINION

HEFFERNAN, Justice.

This proceeding was instituted pursuant to the provisions of Article 78 of the Civil Practice Act by five persons who are presently employed in the school system of the City of New York and one retired teacher. The relief sought by respondents is a determination directing the appellants to disregard Chapter 360 of the Laws of 1949 and to refrain from taking any action for its enforcement.

Appellants made objections in point of law to the petition upon the ground that it does not state facts sufficient to entitle respondents to the relief demanded and also moved that certain allegations be stricken from the petition upon the ground that they are irrelevant, immaterial and redundant. Both motions were denied in the court below.

The issue in this proceeding is precisely the same as that involved in *Thompson et al.* v. *Wallin et al.*, 196 Misc. 686, 93 N. Y. S. 2d 274, 280, that is, whether the Constitution of the State or nation compels the employment, as teachers of children in our public schools, of persons found to advocate the overthrow of our government by force violence or other unlawful means, and whether it is unconstitutional to provide that membership in an organization which, after appropriate notice and hearing, the Board of Regents finds to advocate the overthrow of our government by force, is *prima facie* evidence of disqualification for appointment or retention as teachers in the public schools.

In the Thompson case the action was brought by plaintiffs, as chairman and secretary, respectively, of the "Communist Party of the State of New York" for a declaratory judgment and injunction restraining the enforcement of the statute.

The appellants in this proceeding are the same as the appellants in the Thompson case with the exception of the Commissioner of Education who is one of the appellants in the present proceeding but was not named as a party in the Thompson case.

Both cases were heard together by the Special Term and one opinion was written covering both. Appeals were argued in both cases together in our court and will be decided simultaneously.

There is just one point in this proceeding which is different from the Thompson case in form only.

In their petition in the instant proceeding respondents have incorporated numerous allegations which appellants assert have no bearing on the issues involved. These allegations, which appellants moved to strike out may be grouped as follows:—

1. Allegations pleading the educational background, the religious affiliation, and the political affiliation of each party petitioner, and an allegation setting forth the reason why all this has been pleaded.

2. An allegation as to the period of time which the Legislature considered the bill, when after passage by the Legislature it was signed by the Governor, whether or not

hearings were held upon it by the Legislature and the Governor, whether memoranda concerning it were submitted and petitioners' version of the reasons why the Legislature passed the law.

3. An allegation that there already are laws in effect in this state which would accomplish the purpose of the Feinberg Law.

4. Allegations concerning the hearing which the Board of Regents has already held under the Feinberg Law, Laws 1949, c. 360, and what transpired at that hearing.

5. Allegations as to what the boards of education have thus far done under the Feinberg Law and observations as the results which petitioners foresee from compliance with the rules adopted by the Board of Regents and from enforcement of the law.

[1] Whether or not a particular statute is needed to deal with a situation in the light of other existing statutory provisions is for the legislative body to decide and the courts will not disturb that decision. *Dunne* v. *United States*, 8 Cir., 138 F. 2d 137, certiorari denied 320 U. S. 790, 814, 815, 64 S. Ct. 205, 88 L. Ed. 476.

[2] Since the Regents have made no determination listing an organization, since they have not completed their hearings, what the Regents have done has no bearing upon the constitutionality of the law, in a proceeding brought prior to the completion of the hearings by the Board of Regents, prior to the listing of any organization by the Board of Regents and when the Regents have been restrained from concluding their hearings and reaching a determination.

Since no teacher has been disqualified or even accused under the Feinberg Law, what any board of education has done any more than what the Regents have done under the Feinberg Law thus far, and certainly petitioners' ideas as to the consequences of enforcement of the law have no bearing upon its constitutionality.

Obviously these allegations have no place in a pleading in a legal proceeding and should have been stricken out.

[3] The period of time which the Legislature considered the proposed law, whether or not hearings were held in connection with it by the Legislature or the Governor have nothing to do with its constitutionality or unconstitutionality.

In 1917 the Legislature enacted a statute which now constitutes section 3021 of the Education Law and which reads as follows:

> "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

There has, since 1939, been, in the Civil Service Law, § 12-a. This section applies to all persons in the service of the state or of any civil division or city, as well as to persons in the public school system or in any other state educational institution. It bars appointment or retention of any person in such employment who:—

> "(a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or
>
> "(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;
>
> "(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United

States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means."

The operative provisions of the Feinberg Law constitute an amendment of the Education Law adding a new section 3022 thereto. The provisions of that statute are:

Subdivision 1. The Board of Regents is directed to adopt rules and regulations for the disqualification or removal of teachers and others in the public school system who violate section 3021 of the Education Law, or who are ineligible for appointment or retention under section 12-a of the Civil Service Law.

Subdivision 2. The Board of Regents is directed "after inquiry, and after such notice and hearing as may be appropriate," to "make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they violate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the civil service law."

The Board of Regents is further directed to provide, in the rules and regulations required by the first subdivision of the section, that membership in any organization included in the listing made by it, shall constitute "*prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state."

What has heretofore been set forth is the actual addition by the Feinberg Law to the Education Law as section 3022 thereof. It is section 3 of the Feinberg Law, 1949, c. 350. Section 2 of Chapter 360 is the provision renumbering former sections of the Education Law to permit a new section 3022.

There is a section 1 in Chapter 360 which is not made a part of the Education Law. It contains no directive to the Board of Regents or to any officer or official body. It is the preamble to the law setting forth the reasons why the

Legislature enacted the law. It is not a part or provision of the law to be administered or put into effect.

What is said in this introductory portion of the Feinberg Law is referred to here because respondents' contention that the Feinberg Law violates the constitutional prescription of bills of attainder, is based solely on this introductory section of the law and not upon any of the provisions which are section 3022 of the Education Law.

It is to be noted that the provisions in the Feinberg Law have the effect of giving added protection to persons in the state public school system who might be charged, under section 12-a, subdivision (c), of the Civil Service Law, with being a member of any society or group of persons, which advocate the overthrow of the government by force, violence or any unlawful means.

First, under the Feinberg Law the Board of Regents must, upon notice, conduct a hearing and thereafter list the organizations found as the result of such hearing, to advocate the overthrow of the government by force, violence or other unlawful means. Second, membership in such organization is made *prima facie* evidence only of disqualification for appointment to or retention in any position in the public school system.

The court below has held the Feinberg Law unconstitutional as being a bill of attainder and as contrary to the due process clause of the Constitution of the United States. Amendment 14. From that determination appellants have come to this court.

Full and complete court review of any determination of the Board of Regents listing an organization, and of any determination of a Board of Education finding a teacher disqualified under the Feinberg Law, is available.

[4] An organization listed by the Board of Regents, after hearing upon notice, as advocating the overthrow of the government by force, violence, or other unlawful means has the remedy provided in this state by Article 78 of the Civil Practice Act. This is a statute providing a right of review from the determination of a body or officer "which involves an exercise of judgment or discretion" Civil Practice Act, § 1284. It is a general statute which obtains where no other

remedy is specifically provided. See Matter of *New York Edison Co.* v. *Maltbie*, 271 N. Y., 103, 111-112, 2 N. E. 2d 277, 279.

A teacher found disqualified pursuant to the Feinberg Law by a Board of Education has an election of remedies—several methods of appeal or review from which to choose:

(1) Civil Service, § 12-a, subd. (d), specifically provides the following review procedure:

> "(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until a final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

(2) Education Law, § 310 gives the teacher the right of appeal or petition to the Commissioner of Education.

(3) Education Law, § 2523, subd. 5, accords the teacher an alternative right of review in accordance with the provisions of Article 78 of the Civil Practice Act.

[5] In addition to these remedies where constitutional rights of liberty or property are involved due process entitles the one whose rights are invaded to independent judicial determination in the courts of the constitutional question involved. The constitutionality of an act of the Legislature is reviewable in a court of equity. The Board of Regents is a delegate of the Legislature and regulation by the one is regulation by the other. If an act of the Legislature is reviewable in the courts certainly the act of its delegate is likewise reviewable. *Staten Island Edison Corporation* v. *Maltbie et al.*, 270 App. Div. 55, 58 N. Y. S.

2d 818; affirmed 296 N. Y. 374, 73 N. E. 2d 705, 8 A. L. R. 2d 825.

The sole issue in this case is that which makes one activity—membership in an organization which advocates the overthrow of our government by force—*prima facie* a disqualification to teach in the public schools of this State. The issue is not, as claimed by respondents, freedom of speech, freedom of thought, freedom of assembly or freedom of the press. The Feinberg Law prohibits none of these freedoms.

There is no constitutional right to be a teacher any more than there is to be a public official or a member of any of the professions. No one has a constitutional right to advocate the overthrow of the government by force and violence. The courts have held time and time again that the freedoms guaranteed by the Constitution are not absolute but must yield to the public welfare.

[6] We are not concerned with the wisdom of the Feinberg Law. The question whether such a law should or should not be enacted was one for the Legislature and not for the courts, *Johnson* v. *City of New York*, 274 N. Y. 411, 430, 9 N. E. 2d 30, 38; *People* v. *Nebbia*, 262 N. Y. 259, 271, 186 N. E. 694, 699; *Schieffelin* v. *Goldsmith*, 253 N. Y. 243, 248, 170 N. E. 905, 907.

The Feinberg Law does not disqualify a teacher for membership in the Communist Party or in any other organization; it merely makes *prima facie* evidence of disqualification to be a teacher, membership in an organization which, after notice and hearing, the Board of Regents ascertains to advocate the overthrow of our government by force, violence or other unlawful means. This *prima facie* evidence of disqualification the teacher has full and complete opportunity to rebut. It does not restrict anyone's right to join and be a member of the Communist Party or of any other organization, even one which advocates the overthrow of the government by force. It does not affect anyone's privilege to hold, speak or publish any views, briefs, or opinions, nor the privilege of assembly, nor the privilege of petitioning the government, nor the privilege of exercising any political rights. It does not decree "guilty by association" nor direct that a teacher suffer any dis-

qualification for mere association. The disqualification to be a teacher is for individual action, the association being made merely *prima facie* evidence of disqualification. It does not determine that the organization which styles itself the "Communist Party of the State of New York" does advocate the overthrow of our government by force and violence; it merely directs the Board of Regents to ascertain, after appropriate notice and hearing, those organizations which do advocate that doctrine. It does not direct or permit the Board of Regents to find any organization to be "subversive" merely. It directs and permits the listing of those organizations which advocate the overthrow of the government by force, violence or any unlawful means, and those organizations only.

The standards for qualification as teachers in the public schools are fixed by the Legislature. It may, constitutionally, require as qualification, and declare as disqualification, factors other than scholastic, including as a qualification, adherence to the form of government of the United States, and as a disqualification, advocacy of the overthrow of the government by force, violence or other unlawful means. The qualifications of a teacher in the public schools are more than pedagogical and possession of an ability to impart knowledge of certain technical subjects.

The most important qualification of a teacher is loyalty to our government. It necessarily follows that disqualification is advocacy of the overthrow of that government. The statute under review is a law dealing with public employment of teachers in our public schools. To avail oneself of the privilege of teaching certain qualifications must be possessed, certain rights renounced. This is not an unconstitutional classification. *In re Summers*, 325 U. S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795; *Hawker* v. *People of State of New York*, 170 U. S. 189, 18 S. Ct. 573, 42 L. Ed. 1002; *People* v. *Crane*, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D, 550, Ann. Cas. 1915B, 1254; affirmed 239 U. S. 195, 36 S. Ct. 85, 60 L. Ed. 218; *Neim* v. *McCall*, 214 N. Y. 629, 108 N. E. 1095, affirmed 239 U. S. 175, 36 S. Ct. 78, 60 L Ed. 206, Ann. Cas. 1917B, 287.

When it comes to loyalty to our government, the affirma-

tion of loyalty, the denial of disloyalty, renunciation of membership in organizations advocating overthrow of our government or subscribing to subversive tenets, all have been upheld as qualifications of public employment or of holding office in organzations availing themselves of statutory privileges. *Friedman* v. *Schwellenbach*, 81 U. S. App. D. C. 365, 159 F. 2d 22, certiorari denied 330 U. S. 838, 67 S. Ct. 979, 91 L. Ed. 1285; Id., 331 U. S. 865, 67 S. Ct. 1302, 91 L. Ed. 1870; *Washington et al.* v. *Clark*, D. C. D. C. 84 F. Supp. 964; *National Maritime Union of America* v. *Herzog*, D. C., 78 F. Supp. 146, affirmed 334 U. S. 854, 68 S. Ct. 1529, 92 L. Ed. 1776; *Inland Steel Co.* v. *N. L. R. B.*, 7 Cir., 170 F. 2d 247, certiorari granted 335 U. S. 910, 69 S. Ct. 480; *Wholesale Warehouse Workers Union, Local 65* v. *Douds*, D. C. 79 F. Supp. 563; *Joint Anti-Fascist Refugee Committee* v. *Clark*, D. C. Cir., 177 F. 2d 79, 84.

We are not dealing here with the propaganda of soap box orators, or the utterances of those who preach from housetops or pray on street corners. We are dealing with a statute pertaining solely to teachers whose influence upon the children who come under their instruction is extraordinary. It is, therefore, of paramount importance that the association of teachers and pupil should imbue the latter with love of country, respect for its laws and should inculcate in the childish mind principles of justice and patriotism. We are not so naive as to accept as gospel the argument that a teacher who believes in the destruction of our form of government will not affect his students. It is not necessary to impart a thought by direct statement. The result may be accomplished by indirect, subtle, insinuations; by what is left unsaid as well as by what is said.

The decision of the United States Supreme Court in *United Public Workers of America* v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556, 567, 91 L. Ed. 754, is authority for the constitutionality of the Feinberg Law. In that case the court upheld the constitutionality of the provision of the Hatch Act which forbids federal employees to take "any active part in political management or in political campaigns." In that case too, plaintiffs relied upon the First Amendment, but the court pointed out that "The essential

rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. * * * This Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." In that opinion, as in so many others, the court pointed out that "fundamental human rights are not absolute." Plaintiffs in that case made all of the arguments that respondents here make.

In *People* v. *American Socialist Society*, 202 App. Div. 640, 645-646, 195 N. Y. S. 801, 806, the statute upheld "prohibits the teaching of doctrines inimical to our form of government and tending to the destruction of organized government by force and violence. There can be little question but that it is within the power of the Legislature to enact statutes for the self-preservation of the state, and to prevent the teaching of doctrines advocating the destruction of the state by force. * * *

> "In enacting this statute the Legislature clearly sought to prevent the teaching of doctrines hostile to the safety of our government. We think the Legislature has as much right to enact a salutary statute to prevent the promulgation of doctrines inimical to our form of government, the putting into effect of which would lead to the conviction of those who had adopted said doctrines under existing penal law, as to punish those who were guilty of violating such penal laws."

[7, 8] In holding that the statute is a bill of attainder the Special Term based its decision solely on the contents of section 1 of the law. This section, however, as we have already shown, is no part of the Education Law to be administered by the Board of Regents or any officer or official body. It is merely the preamble to the law, the statement by the Legislature as to its reasons for the enactment of the law.

The only portion of the law which the Board of Regents is required to enforce—or could enforce—is section 3 which became section 3022 of the Education Law.

The introductory section 1 of the law, cannot be read into the operative provisions thereof, cannot be strained to find in it a directive to the Regents to list the Communist Party, cannot be strained to find in it the imposition of punishment upon the Communist Party without a hearing. It does not impose (a) any penalty; (b) without a hearing; and these are the two elements of a bill of attainder.

A bill of attainder is a legislative judgment of conviction, an exercise of judicial power by the legislative body; the imposition of punishment by the legislative act. *People* v. *Hayes*, 140 N. Y. 484, 490, 35 N. E. 951, 952, 23 L. R. A. 830, 37 Am. St. Rep. 572. There is not one of these elements in the Feinberg Law. In the body of the Act in which the Board of Regents is directed to take certain steps there is no mention of any organization at all by name. A hearing is provided for in protection of any organization as to which the Board of Regents shall determine to make inquiry. *Education Law*, § 3022, subd. 2. No penalty, pain or punishment, or deprivation of any kind is imposed upon any organization which the Board of Regents, after a hearing, shall find advocates the overthrow of the government by force. And the organization has the remedy of review by the courts from such findings by the Regents. As to any teacher who is a member of an organization which the Board of Regents finds advocates the overthrow of the government by force, such membership is merely *prima facie* evidence of disqualification. Thus, even at this point the statute does not impose a deprivation. A teacher found to be a member of such organization has all the protection that the Education Law provides for teachers who are charged with any conduct subjecting them to dismissal, with the alternative remedy provided in Civil Service Law, § 12-a, subd. (d).

In concluding that the statute is a bill of attainder the court below relied on *Cummings* v. *State of Missouri*, 4 Wall. 277, 18 L. Ed. 356, and *United States* v. *Lovett*, 328 U. S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252. Neither of these cases sustains the position of the Special Term.

The Cummings case was a criminal statute. The Act itself declared an office vacant or an individual disqualified from practicing certain named vocations if he refused to

take an oath. No provision was made for a hearing of any kind. The oath provided was like the old English and French tests, retrospective and, as the Court said provided punishment for past acts. See page 198 of the opinion of the United States Supreme Court in *Hawker* v. *People of State of New York*, 170 U. S. 189, 18 S. Ct. 573, at page 577, 42 L. Ed. 1002, for a statement of the basis for the decision in the Cummings case. In other words, it was a legislative enactment creating a penalty for past conduct without a hearing.

The Lovett case was an appropriation act of Congress which: (a) named certain individuals by name: (b) provided that these individuals should not receive any salary or compensation under the statute and: (c) further provided that those persons should not receive salary from the federal government at any time in the future. The deprivation thus was by legislative act, and without hearing.

[9-12] The argument is advanced that by its provision making membership in a listed organization *prima facie* evidence of disqualification the statue is vitiated because it makes a new rule of evidence, whereby less or different proof is required to convict, falls because that rule is only applicable to an *ex post facto* law—as regards a criminal or penal statue. Then, too, the argument is fallacious because there is no vested right in a public school employee's retention of position—conditioned as it always is upon the continued possession of prescribed qualifications. And there is, of course, no vested right in an existing rule of evidence. The Legislature has power to change such rules and in so doing it is not restricted by constitutional prohibitions as to taking of life, liberty or property without due process of law. *People* v. *Turner*, 117 N. Y. 227, 233, 22 N. E. 1022, 1023, 15 Am. St. Rep. 498. The Legislature may, without violating constitutional rights, prescribe the qualifications required of those in the public service 16 C. J. S., Constitutional Law § 460. There can be no serious doubt that the state has power to prescribe and maintain qualifications for its public school personnel and thereby exclude those who adhere to the doctrine of criminal anarchy in violation of sections 160, 161 of the Penal Law.

It is a fallacy to suppose that the state is so impotent, so helpless, that it is powerless to ban from its public schools traitorous instructors who preach and teach seditious doctrines with the sinister intent of destroying the constitution which they have sworn to support. It is an arrogant assumption that the government cannot protect itself against the infiltration of those who desire to destroy it by force.

[13] The Feinberg Law is not, as argued by respondents, an *ex post facto* law within the condemnation of the Constitution. That phase is one which relates exclusively to criminal or penal statutes. 11 Am. Jur. Constitutional Law, § 351; 16 C. J. S., Constitutional Law, § 435.

[14] It is a cardinal rule of construction that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. *People ex rel. Simpson* v. *Wells*, 181 N. Y. 252, 257, 73 N. E. 1025, 1026; *People ex rel. Simon* v. *Bradley*, 207 N. Y. 592, 610-611, 101 N. E. 766, 772.

[15] In our opinion the Feinberg Law does not violate the due process guarantee of the State or Federal Constitutions, Const. N. Y. art. 1, § 6, Const. U. S. Amend. 14; neither does it infringe upon the freedoms guaranteed by these fundamental laws.

The law is not a criminal statute. The effect of its application is not criminal punishment. As to a listed organization there is not provision in the statute for taking any action against it. A teacher found to be a member of a listed organization is subject to an administrative hearing at which such membership is received as *prima facie* evidence of disqualification, and if such evidence is not rebutted, the teacher is disqualified from employment as such. Thus, neither a listed organization nor a disqualified teacher is subject to criminal proceedings.

This law nowhere makes "subversive" doctrines or "subversive" conduct a ground for action by the Board of Regents or boards of education. The sole basis of action

under the law is the advocacy of the doctrine of overthrow of the government by force, violence and other unlawful means.

The court below also finds that there is a denial of procedural due process because every member of an organization as to which the Regents hold a hearing to determine whether it is to be listed, is not required to be given notice of the hearing or opportunity to participate.

The same argument was made and rejected in *Matter of Kaney* v. *New York State Civil Service Commission*, 190 Misc. 944, 77 N. Y. S. 2d 8; affirmed 273 App. Div. 1054, 81 N. Y. S. 2d 168; affirmed 298 N. Y. 707, 83 N. E. 2d 11, and to refute it again is but to slay the slain.

The court below also criticizes that provision of the statute as a denial of due process which declares that membership in a listed organization is *prima facie* evidence of disqualification of a teacher.

Again we repeat this is not a criminal statute. Even criminal statutes frequently declare certain circumstances to be a presumptive evidence against the individual charged with crime. Such presumption, even in criminal statues, where the presumption of innocence is a vital principle, is held not to violate that constitutional protection. *People* v. *Farina*, 290 N. Y. 272, 275-276, 49 N. E. 2d 134, 135-136; *People* v. *Pieri*, 269 N. Y. 315, 324, 199 N. E. 495, 498; *People* v. *Adams*, 176 N. Y. 351, 360-362, 68 N. E. 636, 639, 640, 63 L. R. A. 406, 98 Am. St. Rep. 675; Id., 192 U. S. 585, 598, 599, 24 S. Ct. 372, 48 L. Ed. 575; *Board of Com'rs of Excise of Auburn* v. *Merchant*, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; *People* v. *Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; *People* v. *Murphy*, 276 N. Y. 612, 12 N. E. 2d 602; *People* v. *Gerschinsky*, 281 N. Y. 581, 22 N. E. 2d 160; *People ex rel. Woronoff* v. *Mallon*, 222 N. Y. 456, 461, 119 N. E. 102, 104, 4 A. L. R. 463.

[16, 17] Freedom of speech and freedom of the press are among the most precious of our liberties. For the preservation of the government and of the Constitution which guarantees these rights the courts over and over have held that these rights are not absolute; that those who imperil the very existence of our government cannot take shelter in

the guarantees of freedom of speech, press and assembly and makes those guarantees the very means of self-destruction. *Chaplinsky* v. *State of New Hampshire*, 315 U. S. 568, 571, 62 S. Ct. 766, 86 L. Ed. 1301; *Gitlow* v. *People of State of New York*, 268 U. S. 652, 45 S. C. 625, 69 L. Ed. 1138; *Whitney* v. *People of State of California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; *National Maritime Union of American* v. *Herzog*, D. C., 78 F. Supp. 146; affirmed 334 U. S. 854, 68 S. Ct. 1529, 92 L. Ed. 1776.

"The Constitution," said the United States Supreme Court in *U. S. ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407, 414, 41 S. Ct. 352, 355, 65 L. Ed. 704, "was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it." A contemporary statement of the same principle is found in *Barsky* v. *United States*, 83 U. S. App. D. C. 127, 167 F. 2d 241; certiorari denied 334 U. S. 843, 68 S. Ct. 1511, 92 L. Ed. 1767.

And as the Court said in *Gitlow* v. *New York*, *supra*, 268 U. S. at page 669, 45 S. Ct. at page 631: "It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Many cases are discussed in the opinion of the court below, in the briefs of respondents and in those of *amici curiae* which have no bearing on the question before us. We are dealing with the education to be given American citizens, to children in the public schools; with the education of these children who should grow up with the desire and the will to preserve our Constitution and system of government; with the qualification of teachers to so educate them. To that end we are dealing with the specific question as to

whether the State may not declare disqualified a teacher who advocates the destruction of the government and to declare that membership in an organization so advocating is *prima facie* evidence of disqualification.

[18] Neither a legislative body nor the courts may close their eyes to reality. It is a matter of common knowledge that organizations which advocate the overthrow of the government by force endanger the existence of the United States; that to have members of such organizations as teachers of our children in whose hands will soon rest the fate and existence of that government is a peril to its life. No one has to be told that; the Legislature needed no public hearings to learn that.

It is impossible within reasonable limits of an opinion to answer in detail all the contentions urged upon us to strike down the Feinberg Law. We have considered them all and are convinced that all are without merit. True it is that there are loose dicta in the books which give slight support to respondents' contentions. Rarely indeed does one case afford an exact precedent for another. However no well considered authority is called to our attention which would justify the conclusion that the statute under consideration transcends constitutional limitations.

The order appealed from is reversed on the law and the petition dismissed with $50 costs and disbursements to appellants.

Foster, P. J., and Brewster, Bergan and Coon, JJ., concur.

APPENDIX D

301 N.Y. 476, 95 N.E.2d 806

THOMPSON et al. v. WALLIN et al.

L'HOMMEDIEU et al. v. BOARD OF REGENTS OF UNIVERSITY OF NEW YORK et al.

LEDERMAN et al. v. BOARD OF EDUCATION OF CITY OF NEW YORK.

Court of Appeals of New York.

Nov. 30, 1950.

Separate actions by Robert Thompson, as Chairman of the Communist Party of the State of New York, and others, constituting the Board of Regents of the University of the State of New York, and proceeding in the matter of Charles L'Hommedieu, and others, against the Board of Regents of the the University of the State of New York, and others, and an action by Abraham Lederman, as President of the Teachers Union of the City of New York, Local 555 of the United Public Workers and others and Irving Adler against the Board of Education of the City of New York. The basic issue in each case was the constitutionality of the Feinberg Law. In the first entitled action, the Supreme Court, Special Term, Albany County, Shirick, J., 196 Misc. 686, 93 N.Y.S.2d 274, granted judgment on the pleadings declaring Feinberg Law unconstitutional and defendants appealed. The Supreme Court, Appellate Division, Third Judicial Department, 276 App. Div. 463, 95 N.Y.S.2d 784, entered judgment in favor of defendants reversing on the law the judgment of the Special Term and plaintiffs appealed. In the second entitled proceeding the Supreme Court, Special Term, Shirick, J., 196 Misc. 686, 93 N.Y.S.2d 274, entered an order directing defendants from taking any action pursuant to the Feinberg Law and declaring statute to be unconstitutional and defendants appealed. The Supreme Court, Appellate Division, Third Judicial Department, 276 App. Div. 494, 95 N.Y.S.2d 443, entered an order reversing on the law the order of the Special Term

and directed a dismissal of the petition and plaintiffs appealed. In the third entitled action, the Supreme Court, Kings County, Special Term, Hearn, J., 196 Misc. 873, 95 N.Y.S.2d 144, granting plaintiffs' motion for judgment on the pleading and declared Feinberg Law unconstitutional and defendant appealed. The Supreme Court, Appellate Division, Second Judicial Department, 276 App. Div. 527, 96 N.Y.S.2d 466, entered a judgment in favor of defendant reversing on the law judgment of the Special Term and Irving Adler and others appealed. The Court of Appeals, Lewis, J., held that the Feinberg Law is not an unreasonable or arbitrary exercise of the state police power nor an unwarrantable infringement upon any constitutional right of free speech, assembly or association.

Affirmed.

1. Constitutional law—70(3)

The Court of Appeals may not substitute its judgment for that of legislature as to wisdom or expediency of legislation.

2. Constitutional law—102(1)

Schools and school districts—133

A public employee has no vested, proprietary right to his position which transcends public interest or general welfare of community he serves, and public employment as a teacher is not an uninhibited privilege but there may be limitations upon grounds upon which public employment may be denied.

3. Constitutional law—90

Freedom of speech and of press does not confirm an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents punishment of those who abuse privilege. Const. art. 1, § 8; U.S.C.A. Const. Amend. 1.

4. Constitutional law—90

A state in exercise of its police power may punish those who abuse freedom of speech and press by utterances inimical to public welfare, tending to corrupt public morals,

incite crime, or disturb public peace. Const. art. 1, § 8; U.S.C.A. Const. Amend. 1.

5. Schools and school districts—20

It is within province of legislature to decide in first instance whether conditions prevailed within state which threatened well being of its public school system and called for some protective measure.

6. Constitutional law—48

Every presumption is to be indulged in favor of validity of statute, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise authority vested in state in public interest.

7. Constitutional law—275(1)

Where legislature actually found that an infiltration of members of subversive groups into employment in the public schools of state had occurred and continued, that consequence of such infiltration was that subversive propaganda could be disseminated among children of tender years by those who taught them and to whom the children look for guidance, authority and leadership, and that members of such groups frequently used their office or position to advocate and teach subversive doctrines, a clear and present danger existed for exercise of the state's police power. Education Law, §§ 3021, 3022; Const. art. 1, § 8; U.S.C.A. Const. Amend. 1.

8. Constitutional law—275(1)
Officers—61
Schools and school districts—141(4)

The Feinberg Law, prohibiting retention in public employment and in public schools of state of members of any organization which advocates overthrow of federal or state government by force or violence or by unlawful means, and providing for elimination of subversive persons from public school system is not an unreasonable or arbitrary exercise of state police power nor an unwarrantable infringement upon any constitutional right of free speech, assembly or association. Education Law, §§ 3021, 3022; Civil

Service Law, § 12-a; Const. art. 1, § 8; art. 11, § 1; U.S.C.A. Const. Amend. 1.

9. Constitutional law—82

A "bill of attainder" is a legislative act which inflicts punishment without a judicial trial.

See publication Words and Phrases, for other judicial constructions and definitions of "Bill of Attainder".

10. Statutes—210

The preamble of the Feinberg Law, relating to elimination of subversive persons from public school system, enacted nothing, contained no directives and was not made a part of Education Law and cannot be resorted to for construction purposes. Education Law, § 3022; Laws 1949, c. 360.

11. Constitutional law—82
Officers—61
Schools and school districts—141(4)

The Feinberg Law, prohibiting retention in public employment and in public schools of state of members of any organization which advocates overthrow of federal or state government by force or violence of our unlawful means and requiring Board of Regents to list subversive organizations is not unconstitutional as a "bill of attainder," notwithstanding that preamble of law used the expression "Communist Party" as descriptive of one of the subversive groups. Education Law, § 3022; Laws 1949, c. 360; U.S.C.A. Const. art. 1, § 9.

12. Constitutional law—275(1)
Schools and school districts—141(4)
Statutes—47

The Feinberg Law, requiring the Board of Regents to list subversive organization, and providing that membership in an organization named upon any listing should con-

stitute *prima facie* evidence of disqualification for employment as a teacher is not unconstitutionally vague or violative of procedural due process. Education Law, § 3022; Laws 1949, c. 360; Civil Service Law, § 12-a.

13. Schools and school districts—20

The legislature and administrative agencies have authority over discipline and efficiency of public service and when in its judgment and discretion the legislature finds acts by public employees which threaten integrity and competency of the governmental service, such as the public school system, legislation adequate to maintain usefulness of service affected is necessarily required to forestall any danger.

Abraham Unger, Osmond K. Fraenkel, David M. Freedman and Bernard Jaffe, all of New York City, for appellants in first above-entitled action.

Nathaniel L. Goldstein, Atty. Gen. (Wendell P. Brown, Albany and Ruth Kessler Toch, New York City, of counsel), for respondents in first above-entitled action and second above-entitled proceeding.

Samuel M. Birnbaum and Solomon Kreitman, New York City, for American Legion Department of New York, *amicus curiae*, in support of respondents' position in first above-entitled action.

Frederick A. Johnson, Osmond K. Fraenkel, Fred G. Moritt and Morris Eisenstein, all of New York City, for appellants in second above-entitled proceedings.

Arthur Garfield Hays and Osmond K. Fraenkel, New York City, for appellants in third above-entitled action.

John P. McGrath, Corporation Counsel, New York City, (Michael A. Castaldi, Seymour B. Quel and Morris Weissberg, all of New York City, of counsel), for respondent in third above-entitled action.

Lewis, Judge.

An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Educa-

tion Law, L. 1949, ch. 360, Consol. Laws, c. 16, commonly known, and hereinafter referred to as the Feinberg Law.[1]

At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed throughout the broad field of State civil service. Thus we find that by the Laws of 1917, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

"§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district

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[1] The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

Thompson v. *Wallin*, 276 App. Div. 463, 95 N.Y.S.2d 784, is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the Feinberg Law unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs, 196 Misc. 686, 93 N.Y.S.2d 274. At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute unconstitutional.

Matter of *L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, 95 N.Y.S.2d 443, is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing the defendants, Board of Regents and others "to disregard Chapter 360 of the Laws of 1949 [Feinberg Law], and to cease and desist from taking any steps toward the enforcement of the provisions of said law * * * and to treat said enactment as a nullity * * *."

of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

"12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or college, or any other state educational institu-

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At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted, 196 Misc. 686, 93 N.Y.S.2d 274. At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

Lederman v. *Board of Education of City of New York*, 276 App. Div. 527, 96 N.Y.S.2d 466, is an action by Teachers Union, Local 555 of the United Public Workers, and others in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law, Consol. Laws, c. 7, and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings, 196 Misc. 873, 95 N.Y.S.2d 114. At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

tion who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature —which prefaces the three operative sections of the statute

—is declaratory of conditions found by the Legislature which prompted the enactment:

"Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with

the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature."[2]

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360, added to the Education Law as section 3022, provides as follows:

"§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings

[2] Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

may be amended and revised from time to time. The Board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state * * * "

[1] In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 400-401, 70 S.Ct. 674; *People* v. *Nebbia*, 262 N.Y. 259, 271, 186 N.E. 694, 699. Within those limits we examine the challenged law to determine whether, as claimed by the appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents —after inquiry, notice and hearing— shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for appointment or retention in the service of the public school system.

[2] In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to im-

plement section 12-a of the Civil Service Law (quoted *supra*) —an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State—the education of its children. (N.Y. Const., art. XI, §1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Educational Law which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system.. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556,

91 L.Ed. 754; *American Communications Ass'n* v. *Douds, supra*, 339 U.S. at page 405, 70 S.Ct. 674; *People of State of New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 72-73, 49 S.Ct. 61, 73 L.Ed. 184; *Patsone* v. *Com. of Pennsylvania*, 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539; *Hawker* v. *People of State of New York*, 170 U.S. 189, 192-197, 18 S.Ct. 573, 42 L.Ed. 1002. Those cases stand for the legal principle which prompted Judge Holmes—as he then was—to write in *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, the familiar statement: "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."

[3, 4] Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the Feinberg Law, is incompatible with freedoms guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preservation. We are also aware that those freedoms do not sanction unbridled license. *People* v. *Gitlow*, 234 N.Y. 132, 137, 136 N.E. 317, 319, affirmed, *sub nom. Gitlow* v. *People of State of New York*, 268 U.S. 652, 666-667, 45 S.Ct. 625, 69 L.Ed. 1138; *Schenck* v. *United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470. Indeed "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." *American Communication Ass'n* v. *Douds, supra*, 339 U.S. at page 394, 70 S.Ct. at page 682. When *People* v. *Gitlow, supra*, reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry. 268 U. S. at pages 666-668, 45 S.Ct. at page 630.

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the

Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by the Court in the *Fox* Case [*Fox* v. *Washington*, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573] that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert* Case, [*Gilbert* v. *State of Minn.*, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287], that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and *threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press,* said Story (*supra*) *does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. * * * It does not protect publications prompting the overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. * * * And *a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. * * * In short this freedom does not deprive a State of the primary and essential*

right of self preservation; which, so long as human governments endure, they cannot be denied." (Emphasis supplied.) See, also, *Cox* v. *State of New Hampshire*, 312 U. S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 1049; *Gilbert* v. *State of Minnesota*, 254 U. S. 325, 332, 339, 41 S. Ct. 125, 65 L. Ed. 287; *Schenck* v. *United States*, *supra*, 249 U. S. at page 52, 39 S. Ct. 247; *Fox* v. *State of Washington*, 236 U. S. 273, 276-277, 35 S. Ct. 383, 59 L. Ed. 573; *Patterson* v. *State of Colorado*, 205 U. S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 294, 24 S. Ct. 719, 48 L. Ed. 979; *Robertson* v. *Baldwin*, 165 U. S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715; *People* v. *Most*, 171 N. Y. 423, 431, 64 N. E. 175, 178, 58 A. L. R. 509.

[5, 6] In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which threatened the well-being of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislature has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *State of Kansas*, 123 U. S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." *Whitney* v. *People of State of California*, 274 U. S. 357, 371, 47 S. Ct. 641, 647, 71 L. Ed. 1095. Paraphrasing what was written in *Gitlow* v. *New York*, 268 U. S. 652, 669, 45 S. Ct. 625, 631, *supra*, we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * * ; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

[7] Whether that danger was "clear and present"—within the rule of *Schenck* v. *United States, supra*, 249 U. S. at page 52, 39 S. Ct. at page 249, as interpreted and applied in *American Communications Ass'n.* v. *Douds, supra*, 339 U. S. at Pages 393-400, 70 S. Ct. 674,—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership; and that members of such groups frequently use their office or position to advocate and teach subversive doctrines.

[8] Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

[9-11] A bill of attainder has been defined as "* * * a legislative act which inflicts punishment without a judicial trial." *Cummings* v. *State of Missouri*, 4 Wall. 277, 323, 18 L. Ed. 356. By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the

Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. *Pumpelly* v. *Village of Owego*, 45 How. Prac. 219, 257. Furthermore, a textual examination of the provisions of the Feinberg Law—section 3022—in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing— shall find advocates the overthrow of government by force or unlawful means. *Cf. American Communications Ass'n* v. *Douds*, *supra*, 339 U. S. at pages 413-414, 70 S. Ct. 674. In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

[12] There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "after inquiry, and after such notice and hearing as may be appro-

priate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in, the State public school system knowingly holds membership in an organization named upon any lisfing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee*, 220 N. Y. 431, 433, 116 N. E. 78, 79, 8 A. L. R. 785: "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification" as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. Civil Service Law, §12-a, subd. (d). Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

[13] We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected

is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

Loughran, C. J., and Conway, Desmond, Dye, Fuld and Froessel, JJ., concur.

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